

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

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SHIELDMARK, INC.,)

Plaintiff,)

vs.) 1:12-CV-00223-DCN

INSITE SOLUTIONS,) Judge Donald C. Nugent

Defendant.)

- - -

Deposition of THOMAS R. GOECKE, a
Witness herein, called by the Defendant for
cross-examination pursuant to the Federal
Rules of Civil Procedure, taken before me,
the undersigned, Michael G. Cotterman, a
Notary Public in and for the State of Ohio,
at 106 South Main Street, 4th Floor, Akron,
Ohio, on Thursday, the 25th day of April,
2013, at 9:40 o'clock a.m.

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ALSO PRESENT:

Cliff Lowe

- - -

I N D E X

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MR. WEBER	5 / 9
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MR. COHN	-- / --
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1 THOMAS R. GOECKE
2 of lawful age, a Witness herein, called for
3 examination, as provided by the Rules of
4 Civil Procedure, being by me first duly
5 sworn, as hereinafter certified, deposed and
6 said as follows:

7 - - -

8 CROSS-EXAMINATION

9 BY MR. WEBER:

10 Q. Would you state your name for the
11 record please?

12 A. My name is Thomas R. Goecke.

13 Q. Okay. Mr. Goecke, have you ever had
14 your deposition taken before?

15 A. No.

16 Q. Okay. You've attended at least one
17 deposition that I'm aware of, have you
18 attended any others?

19 A. That was my first one.

20 Q. That was your first, okay. So you
21 understand that you're under oath?

22 A. Yes, I do.

23 Q. And you understand that a record is
24 being made of everything that's going here,
25 including my questions and your answers?

1 A. Yes, I do.

2 Q. Okay. If you don't understand a
3 question that I propound, it's probably my
4 fault, not yours, so I don't want you to
5 hesitate to ask me to restate it, rephrase it
6 or whatever so that you understand the
7 question before you answer it, is that fair
8 enough?

9 A. That's fair.

10 Q. Okay. And we can take a break any
11 time anyone wants to, and there are a number
12 of people with gray here in the room so that
13 may be with some frequency, but I would just
14 ask that we don't have a question pending
15 when we take a break, okay?

16 A. Okay.

17 MR. WEBER: All right. We'll get
18 right to these two first.

19 (Defendant's Exhibit
20 Nos. 1 and 2 marked
21 for identification.)

22 BY MR. WEBER:

23 Q. Have you seen Exhibit 1 before?

24 A. Maybe via e-mail.

25 Q. Okay. That's just a notice of your

1 personal deposition, so you understand that
2 you're here to testify personally; is that
3 correct?

4 A. Yes, I do.

5 Q. Okay. And then Exhibit 2, have you
6 ever seen that before?

7 A. This is my first time seeing this.

8 Q. Okay. I'd like for you to look back
9 on the last page of Exhibit 2, which is a
10 notice of deposition of your company, and it
11 lists eleven matters for examination, it's
12 back on page three. Have you seen that list
13 before?

14 A. This is the first time.

15 Q. Okay. Well, would you look over the
16 list and tell me if, despite the fact that
17 you've not seen it before, have you prepared
18 yourself to testify on those topics?

19 A. Yes, I have.

20 Q. Okay. And what did you do to prepare
21 yourself to testify?

22 A. I met with counsel.

23 Q. Okay. Anything else?

24 A. Just went over what happens in a
25 deposition and how --

1 MR. COHN: The subject of our
2 meeting, unless you're talking about
3 separately from our meeting, the subject of
4 our meeting is privileged.

5 BY MR. WEBER:

6 Q. Yeah, I don't want you to tell me
7 what you discussed with counsel, but did you
8 do anything else besides a meeting with
9 counsel, did you look at documents, did you
10 go through your corporate files, did you
11 look at your calendar, anything of that
12 nature?

13 A. I prepared a summary of events.

14 Q. Sort of a time chart?

15 A. Yes.

16 Q. Okay. And did you prepare that for
17 your use?

18 A. No, for the attorneys.

19 Q. For the attorneys' use. When did you
20 prepare that?

21 A. Probably shortly after I received the
22 '480 patent.

23 Q. Before you received the '480 patent?

24 A. Once I received the '480.

25 Q. Once you received it, okay. And was

1 that a chronology of events that bear upon
2 this lawsuit?

3 MR. COHN: Objection, don't
4 answer, that's both attorney/client privilege
5 and it is work product.

6 BY MR. WEBER:

7 Q. Why did you make up that list?

8 A. On the advice of counsel, it's a good
9 thing to do.

10 Q. On the advice of counsel or request
11 of counsel?

12 MR. COHN: Objection, once you
13 characterize what counsel said, that's
14 privileged. He's answered the question but
15 it's inappropriate, I'm not sure of the
16 difference.

17 BY MR. WEBER:

18 Q. Okay. Do you understand the
19 difference between advice and request?

20 A. I guess you're splitting hairs, I'm
21 not sure what the difference is.

22 Q. Okay, all right. Could you share
23 with me your educational background?

24 A. After high school I was drafted into
25 the service. After the service I attended

1 the University of North Dakota for two years,
2 transferred to Ohio State, graduated with a
3 bachelor's in accounting. And after, after
4 that I received an MBA at Case Western
5 Reserve in 1985.

6 Q. When did you receive your bachelor's
7 in accounting?

8 A. 1980, early 1980.

9 Q. Did you, in your accounting
10 curriculum did you take any engineering
11 courses?

12 A. Not in my accounting curriculum.

13 Q. Have you ever taken any engineering
14 courses?

15 A. Yes, industrial engineering courses
16 at part of my MBA program at Case Western
17 Reserve.

18 Q. And what did those courses involve?

19 A. They were more emphasized on how to
20 organize processes, to make the most
21 efficient and effective in an organization.

22 Q. Would that be what's often referred
23 to as process engineering?

24 A. Yes.

25 Q. Let's talk about your employment

1 history. Share with me in the narrative, if
2 you will, your employment history from high
3 school to present?

4 A. You'll have to give me some time
5 here, the years go by.

6 Q. Okay.

7 A. After high school, let's see, I
8 worked at a small stamping plant in
9 Coldwater, Ohio, Packs Manufacturing I
10 believe it was. I was drafted into the
11 service, spent two years in the Army.

12 Q. And when was that?

13 A. '72 through '74.

14 Q. Do you remember what your lottery
15 number was?

16 A. I think it was 38.

17 Q. Not a good number, okay. So two
18 years in the service and then what, what did
19 you do in the service?

20 A. I was a track vehicle mechanic.

21 Q. A track vehicle mechanic?

22 A. Yes.

23 Q. Okay. After the service what was
24 your next employment?

25 A. I worked on a dairy farm with one of

1 my friends.

2 Q. Where was that?

3 A. He held property in western Indiana.

4 Q. And how long did you work on the
5 dairy farm?

6 A. Until the fall of I guess it was '75
7 or might have been '76, it was probably '76,
8 then I went to the University of North
9 Dakota.

10 Q. Now, when you were working on the
11 dairy farm, you were doing typical farming
12 chores?

13 A. Milking cows, yes.

14 Q. Feeding and milking and herding. Did
15 you do any work while you were in college,
16 did you have any jobs?

17 A. Yes, at the University of North
18 Dakota I worked in a service station at night
19 and I had some campus job that was measuring
20 light emissions at the different classrooms
21 or whatever, I think it was mostly a
22 make-work project.

23 Q. Your next employment venture?

24 A. After I graduated from Ohio State I
25 obtained a job at Parker Hannifin in

1 Cleveland, Ohio.

2 Q. And what did you do at Parker
3 Hannifin?

4 A. I started out as a cost accountant
5 and ended up as a cost accounting supervisor.

6 Q. How long were you with Parker
7 Hannifin?

8 A. Until I think 1987.

9 Q. And what did you do next?

10 A. I was in a job at All Type Software
11 in Pearl Heights, Ohio.

12 Q. How do you spell --

13 A. Or not Pearl Heights, on Pearl Road
14 in Middleburgh Heights, Ohio.

15 Q. And how do you spell All Type?

16 A. A-L-L, and then T-Y-P-E.

17 Q. Two words?

18 A. Right.

19 Q. Okay. And what was the nature of the
20 business at All Type Software?

21 A. They sold or were attempting to sell
22 an MRP system, material resource planning
23 system, that had Data General computers, it
24 was an educational job.

25 Q. What did you do there?

1 A. Provided support as far as if the
2 sales team obtained an interested customer, I
3 could give them demos, going through the
4 software itself, and also assisted the sales
5 team making cold calls to try to attract
6 customers.

7 Q. So was it basically a sales job that
8 you were engaged in?

9 A. Yes, it was more related to sales.

10 Q. It wasn't accounting?

11 A. No.

12 Q. Okay. And how long were you with All
13 Type?

14 A. For the two years.

15 Q. So that took you to 1989?

16 A. Correct.

17 Q. And why did you leave All Type?

18 A. I changed jobs to work for
19 Lear-Siegler in Maple Heights, Ohio.

20 Q. I know you changed jobs but was there
21 a reason you changed jobs, did All Type go
22 out of business?

23 A. No, All Type didn't go out of
24 business but it was what I considered a dead
25 end job so...

1 Q. Did you leave on good terms?

2 A. Yes.

3 Q. Same question for Parker Hannifin,
4 why did you leave Parker Hannifin?

5 A. At the time I was working in Andover,
6 Ohio, at a plant they had there and I wanted
7 something closer to home.

8 Q. And what was home?

9 A. At that time I was living in
10 Lakewood, Ohio.

11 Q. Then Lear-Siegler, where are they
12 located?

13 A. They were located in Maple Heights,
14 Ohio. I'm not sure they're still there, I
15 don't think they are.

16 Q. And what did you do at Lear-Siegler?

17 A. I was responsible for MRP
18 implementation.

19 Q. What do you mean by implementation?

20 A. They had procured a new
21 enterprise-wide software system that was
22 converted from one type of system to the
23 I.B.M. mainframe, whatever it was, and they
24 were struggling with trying to put it in.

25 Q. What did you do -- well, let me ask

1 you this, were you successful in implementing
2 their system for them?

3 A. No.

4 Q. How long were you with Lear-Siegler?

5 A. Two years.

6 Q. So that takes us to 1991?

7 A. Correct.

8 Q. Is that what you did your entire time
9 with Lear-Siegler, attempt to implement the
10 MRP?

11 A. And give them evaluations of the
12 software, let them know that it was really
13 not implementable, it was a, not a good
14 software system.

15 Q. Okay. So after Lear-Siegler what did
16 you do?

17 A. I worked for Price Waterhouse as a
18 consultant.

19 Q. Are you a CPA?

20 A. No.

21 Q. How long did you work with Price
22 Waterhouse?

23 A. Two years.

24 Q. I'm seeing a trend here. So that
25 takes us to 1993, correct?

1 A. Correct.

2 Q. Now, when you say you worked for them
3 as a consultant, what, what type of
4 consulting did you do?

5 A. They were implementing an activity
6 based cost system at -- not General Mills
7 but, shoot, I can't think of the name, a huge
8 breakfast cereal company -- Kellogg's,
9 Kellogg's.

10 Q. In Battle Creek?

11 A. In Battle Creek, Michigan, yes.

12 Q. And you were a consultant on that
13 project?

14 A. Yes.

15 Q. Is that what you worked on totally
16 during your employment with Price
17 Waterhouse?

18 A. Yes.

19 Q. So in 1993 you left them and was that
20 on good terms?

21 A. Yes.

22 Q. And where did you go then?

23 A. I went to Myers Industries or
24 Akro-Mils, a division of Myers Industries.

25 Q. So you worked for the Akro-Mils

1 division, right?

2 A. Yes.

3 Q. Is that a division or a subsidiary?

4 A. A division.

5 Q. And that was here in Akron, right?

6 A. That's correct.

7 Q. Out off of Waterloo Road?

8 A. Off Waterloo Road, which is no longer
9 there.

10 Q. Okay. And what did you do for
11 Akro-Mils?

12 A. I was responsible for systems
13 implementations, I oversaw purchasing, the
14 purchasing department, and responsible for
15 inventory control.

16 Q. And what were the products of
17 Akro-Mils?

18 A. They were keep boxes.

19 Q. I'm sorry?

20 A. Keep boxes.

21 Q. Keep?

22 A. Keep boxes, twelve gallons containers
23 with flip lids over the top, AkroBins and
24 multi-drawer plastic cabinets.

25 Q. For nuts, bolts and --

1 A. Correct.

2 Q. -- sundry items. Those were the
3 three major --

4 A. Flower pots also.

5 Q. Okay. Were those all manufactured
6 here in the Akron area?

7 A. Not the flower pots.

8 Q. But the other three items were?

9 A. Yes.

10 Q. And how long were you with Akro-Mils?

11 A. About ten years.

12 Q. Okay.

13 A. I broke your cycle.

14 Q. I know, okay. What was your starting
15 position at Akro-Mils, did you have a title,
16 like junior systems implementer?

17 A. I believe it was MRP manager.

18 Q. Okay. And did that title change?

19 A. No, it didn't.

20 Q. So you were the MRP manager for
21 Akro-Mils for ten years?

22 A. That's correct.

23 Q. Is Myers Industries a publicly traded
24 company?

25 A. Yes, it is.

1 Q. Was it publicly traded when you
2 worked there?

3 A. Yes, it was.

4 Q. Did you own any stock in Myers
5 Industries?

6 A. Yes.

7 Q. And was that stock that you obtained
8 as a part of your employment or stock that
9 you purchased independently or both?

10 A. Both.

11 Q. So you received Myers Industries
12 annual reports, didn't you, as a shareholder?

13 A. Yes.

14 Q. And what were the other divisions of
15 Myers Industries?

16 A. There was the tire division, Myers
17 Tire, there was Patch Rubber of course.
18 There were others but I can't remember them
19 right now at this time.

20 Q. Okay. Myers Tire and Patch Rubber
21 were also right here in the Akron area; is
22 that correct?

23 A. Not Patch Rubber, they were at one
24 time but not when I was there, they had
25 already moved.

1 Q. Okay. And where, do you know where
2 they had moved to or to where did they move?

3 A. Roanoke, North Carolina.

4 Q. In your ten year period of employment
5 with Akro-Mils did you ever have any dealings
6 with Patch Rubber or any of the employees of
7 Patch Rubber?

8 A. One time.

9 Q. And when was that?

10 A. They were looking at, at Christmas
11 time they always striped the floor at Myers,
12 similar to the way they do at other
13 locations, and I had called someone there, I
14 knew that they did it for highway marking and
15 inquired about doing it inside.

16 Q. Do you recall who you talked to?

17 A. No, I don't.

18 Q. You wanted some marking done inside
19 the Akro-Mils plant?

20 A. Correct.

21 Q. And did, did Patch Rubber provide you
22 any materials to do the marking?

23 A. No, they advised against it.

24 Q. And why was that?

25 A. They said they didn't want to use

1 it, you really don't want to use it for
2 interior applications, the highway tape,
3 because it doesn't clean up well. And my
4 understanding was that it was tar based on
5 the bottom side and the glass beads on the
6 top surface.

7 Q. Those were reflective beads?

8 A. Correct.

9 Q. Are you saying that, what was it,
10 adhesive tar base?

11 A. That was my understanding.

12 Q. And you got that understanding from
13 the gentleman or the individual you talked
14 to?

15 A. Correct, it was a gentleman but I
16 don't remember his name.

17 Q. Okay. And it didn't clean up well,
18 do you know why it didn't clean up well?

19 A. I surmised that the reason it didn't
20 clean up well was the tar base.

21 Q. Okay. Well, was cleaning up well
22 important to you?

23 A. Yes.

24 Q. Why is that?

25 A. Because if you need to lay down new

1 material or whatever, it makes the process
2 difficult if you have to remove stuff that's
3 hard to remove.

4 Q. Okay. So by clean up well you meant
5 removability?

6 A. Correct.

7 Q. Did you care whether or not the tape
8 actually looked good on the surface and
9 cleaned up well on the surface?

10 A. Of course.

11 Q. Why do you say of course?

12 A. Because when you put floor lines
13 down, you want to have something demarcating,
14 to have contrast with the surroundings. And
15 with forklift truck tires traveling across
16 the top of the line, whatever the line is
17 made of, if it obscures that then it does not
18 serve its purpose as segregating wheeled
19 vehicles from foot traffic.

20 Q. Okay. Do you know if, if Patch made
21 any of this marking tape without glass
22 beads?

23 A. No.

24 Q. You don't know?

25 A. I didn't know at the time.

1 Q. Okay. I apologize, I think I
2 probably asked a negative question and I'm
3 not sure of the import of your answer so let
4 me approach it a different way.

5 Did Patch Rubber make marking
6 tape without glass beads at this time, the
7 time we're talking about?

8 A. Not that I understood.

9 Q. Okay. Did you end up getting some
10 marking tape for your --

11 A. No.

12 Q. Why not?

13 A. Because of the advise I received.

14 Q. Well, did you get marking tape from
15 anybody?

16 A. We continued to paint.

17 Q. You continued to paint on the floor?

18 A. Correct.

19 Q. Okay. Did you look for marking tape
20 from any other source?

21 A. Not to my recollection.

22 Q. Did you ask the folks at Patch Rubber
23 if they could lead you to a source that made
24 indoor marking tape?

25 A. No.

1 Q. Can you recall a reason why you
2 didn't do that?

3 A. No.

4 Q. Do you personally know anyone who
5 worked at Patch Rubber?

6 A. No.

7 Q. Okay. I'd like for you to describe
8 for me in as much detail as you can the
9 product that Patch Rubber was making that you
10 found to be unsuitable based upon the advice
11 of the gentleman from Patch Rubber?

12 MR. COHN: Objection. You can
13 answer.

14 THE WITNESS: My understanding is
15 that it was a glass beaded product with tar
16 adhesive on the bottom side.

17 BY MR. WEBER:

18 Q. And what was --

19 A. Used to adhere to pavement surfaces.

20 Q. What was the top side of the
21 product?

22 A. I don't really know, other than to
23 know that it included glass beads, the top
24 surface.

25 Q. Well, was what the top surface was of

1 any importance to you in looking for a tape
2 to meet the needs of your company?

3 MR. COHN: Objection.

4 THE WITNESS: The surface I'm sure
5 would make a difference, yes, what the top
6 surface was.

7 BY MR. WEBER:

8 Q. Okay. Explain to me what you mean by
9 it would make a difference?

10 A. If you have a pebbly glass bead
11 surface, most likely it will be difficult to
12 clean.

13 Q. Any other issues that you would or
14 did consider with regard to the top surface
15 when you were talking to Patch Rubber?

16 A. No.

17 Q. Did you have tow motors at Akro-Mils?

18 A. Yes.

19 Q. Did you want to have a tape that the
20 tow motors could go over without damaging
21 it?

22 A. Yes.

23 MR. COHN: Let me note an
24 objection, maybe he understood it but without
25 damaging it, what was it?

1 BY MR. WEBER:

2 Q. Without damaging the tape?

3 A. Yes.

4 Q. Okay. Did those tow motors have
5 skids on them or use skids, forklifts to move
6 pallets along the floor surface?

7 A. They moved skids.

8 Q. Okay. And did you want a tape that
9 would withstand impact with the skids?

10 A. Yes.

11 Q. Did you tell that to the person at
12 Patch Rubber?

13 A. I don't believe. I don't recall the
14 conversation other than to know that I had a
15 conversation of that nature that I spoke
16 about.

17 Q. Well, you would have wanted a tape, a
18 marking tape that would have had a top
19 surface that would have withstood impact from
20 skids, correct?

21 MR. COHN: Objection.

22 THE WITNESS: Correct.

23 BY MR. WEBER:

24 Q. Okay. And the highway tape would
25 withstand impact from cars, trucks, vehicles

1 on the highway, right?

2 A. To an extent.

3 Q. Okay. And beyond being reflective,
4 what did you understand the top surface of
5 the Patch Rubber product to be?

6 MR. COHN: Objection. You
7 chastised me for going over things twice,
8 I'll point that out to you.

9 MR. WEBER: I didn't chastise you
10 for twice, it was about the fifth time that I
11 did, but in any event...

12 MR. COHN: Well, we can disagree
13 about that.

14 MR. WEBER: Okay, go ahead.

15 THE WITNESS: What was the
16 question again?

17 MR. WEBER: Would you read that
18 back, Mr. Cotterman.

19 (Previous testimony read back as requested.)

20 THE WITNESS: A product used on
21 highways, where pneumatic tires travel across
22 it, that is used to adhere to pavement
23 surfaces.

24 BY MR. WEBER:

25 Q. Were these glass beads embedded in

1 something?

2 A. That is my understanding of the
3 tape.

4 Q. Okay. And was it your understanding
5 it was embedded in a plastic layer?

6 MR. COHN: Objection.

7 THE WITNESS: I do not know what
8 type of layer the glass beads at Patch Rubber
9 were inserted in.

10 BY MR. WEBER:

11 Q. Inserted in?

12 A. Applied to or...

13 Q. Okay. Can you put a general time
14 frame on when you contacted Patch Rubber, the
15 event that we've been talking about here for
16 the last ten minutes or so?

17 A. Probably around 1999-2000, I'm not
18 sure.

19 Q. When did you leave Patch Rubber?

20 A. I didn't.

21 Q. I'm sorry, I apologize, thank you,
22 when did you leave Akro-Mils?

23 A. March of 2003.

24 Q. And why did you leave?

25 A. They were having financial

1 difficulties and I was, I selected myself to
2 leave because they needed to reduce my
3 department.

4 Q. So it was a staff reduction?

5 A. Uh-huh.

6 Q. You volunteered to leave?

7 A. I was brought in and told somebody in
8 my department had to go, so I volunteered.

9 Q. Okay. And what did you do next?

10 And let me just ask you, during
11 the entire period of time that you were at
12 Akro-Mils, did you mark the floors with
13 paint, is that your testimony?

14 A. I didn't mark the floors with paint
15 but the floors were marked.

16 Q. Were marked with paint at your
17 direction?

18 A. No.

19 Q. Okay. Why did it -- well, okay,
20 strike that.

21 It wasn't a part of your job to
22 oversee or to have the floors marked at
23 Akro-Mils; is that correct?

24 A. That is correct.

25 Q. Okay. Why was it you that ended up

1 contacting Patch Rubber for marking tape for
2 the floors?

3 A. I was allowed some leeway because of
4 my purchasing role to look for things that
5 could be presented to the plant managers as
6 far as here's alternatives if you're
7 interested.

8 Q. Did you ever go to the headquarters
9 of Myers Industries while you were working at
10 Akro-Mils?

11 A. Yes.

12 Q. Did you ever see a display of the
13 various products that the divisions of Myers
14 Industries make on display there at the
15 headquarters?

16 A. Yes, I'm sure I did.

17 Q. Did you see the Patch Rubber tape
18 there?

19 A. I don't recall. If I did, my memory
20 doesn't recollect that at any point in time
21 to say, oh, here's the floor tape.

22 Q. Do you recall any, any of the Myers
23 Industries products that you did see on
24 display?

25 A. Yes.

1 Q. Okay, what products do you recall?

2 A. Tire stems, patch repair thread, the
3 needle you stick in the tire.

4 Q. The tubeless tire plug?

5 A. Correct.

6 Q. Okay. So after you left Akro-Mils in
7 March of 2003 what did you do?

8 A. I ran ShieldMark Incorporated.

9 Q. Now, is ShieldMark Incorporated the
10 Plaintiff in this lawsuit that brings us
11 together?

12 A. Yes, it is.

13 Q. Okay. So you said you ran it, was
14 ShieldMark Incorporated in existence when you
15 left Akro-Mils?

16 A. I had ShieldMark as an LLC started in
17 November of 2000 that I ran as a part-time
18 business.

19 Q. And what were the, what was the
20 nature of the business of ShieldMark LLC from
21 November of 2000 until the time you left
22 Akro-Mils?

23 A. There were different products that I
24 was looking at to develop to make internal
25 for a marking floor tape system, an internal

1 tape for inside buildings, inside factories
2 and warehouses.

3 Q. Was your motivation for doing that
4 the inapplicability of the Patch Rubber
5 product to meet your needs at Akro-Mils?

6 A. No.

7 Q. Okay. What was the, the germ, if you
8 will, for your effort in developing such a
9 tape?

10 A. Well, across my career at different
11 points in time, starting with Parker
12 Hannifin, I noticed a tremendous amount of
13 manpower expended maintaining floor lines
14 that separated motor vehicles from foot
15 traffic and designated walking areas.

16 Q. So you saw that at Parker Hannifin,
17 anywhere else?

18 A. Lucas Aerospace.

19 Q. Lucas Aerospace?

20 A. Lucas Aerospace, if I can go back,
21 Lucas Aerospace was a result of the
22 Lear-Siegler, it used to be Lear-Siegler but
23 it became Lucas Aerospace, a British owned
24 company. So.

25 Q. So you saw the same issue at

1 Lear-Siegler?

2 A. Yes, or Lucas.

3 Q. Or Lucas, okay. And any other
4 observations that you made that led you to
5 this endeavor?

6 A. No, no, other than, other than the
7 painting of floor lines was a messy process
8 that you had to, based on my training you
9 had to stop production while the lines, wait
10 for them to dry as opposed to an
11 alternative.

12 Q. So for a period of about two and a
13 half years, while you were employed by
14 Akro-Mils, you were in this part-time venture
15 of ShieldMark LLC, exploring the development
16 of an indoor marking tape; is that fair to
17 say?

18 A. That's correct.

19 Q. Who all was involved in that effort
20 with you?

21 A. Originally myself.

22 Q. Let's take it on up to when you left
23 Akro-Mils, was it always you by yourself
24 until you left Akro-Mils?

25 A. No.

1 Q. Okay. Tell me who joined in the
2 effort?

3 A. I contacted Advanced Plastics in
4 Wadsworth, Ohio, who was an extruder.

5 Q. Why did you contact an extruder?

6 A. The first cut of the product that I
7 envisioned I made out of an eighth inch thick
8 polycarbonate sheet, had it slit. And I
9 thought that that would be something that
10 would work well, polycarbonate, but if you
11 have it in just four foot sections, it makes
12 it very difficult to, it makes it labor
13 intensive to put down.

14 Q. So you wanted what, a long web of
15 this, or I don't know what you would call
16 it?

17 A. Yes.

18 Q. Would web be appropriate?

19 A. I'm not sure if web is appropriate
20 but a roll.

21 Q. Okay, all right. And making a long
22 piece then, you would want to extrude it, is
23 that what you're saying?

24 A. Yes.

25 Q. So you contacted Advanced Plastics

1 because they were extruders?

2 A. That's correct.

3 Q. What kind of products did they
4 extrude?

5 A. Jump ropes, edging for cabinets, on
6 bookshelf cabinets, and they were also --
7 that's it, other bookshelf parts they make.

8 Q. And who did you deal with at Advanced
9 Plastics?

10 A. Phil Nye.

11 Q. Phil Nye?

12 A. Phil Nye.

13 Q. Did you know of -- well, when did
14 you first learn of Advanced Plastics or Phil
15 Nye?

16 A. I have to think about this. I think
17 it was in 2001, sometime in 2001.

18 Q. Were you just looking for a plastics
19 extruder?

20 A. Correct.

21 Q. Who were the other candidates, if
22 there were others?

23 A. There was an extruder, and I forget
24 the name, in Strongsville, Ohio, that I
25 checked out also.

1 Q. Had Akro-Mils done any work with
2 Advanced Plastics?

3 A. No.

4 Q. Was Advanced Plastics a competitor of
5 Akro-Mils?

6 A. No.

7 Q. Did you first meet Phil Nye then as a
8 consequence of this venture in about 2001?

9 A. Yes, I called him up.

10 Q. And what did you tell him?

11 A. That I had an idea and I had samples
12 of it, the slit sheets that I mentioned, and
13 I wanted to know if he would be interested in
14 making some on my behalf.

15 Q. And what did he say?

16 A. Well, he came back, gave me a quote
17 and let me know how much the dies would be,
18 went to making it.

19 Q. Do you have any of the samples or
20 specimens that you first made in 2000,
21 November of 2000 through March 2003 time
22 period?

23 A. No.

24 Q. But you said the plastic material was
25 a polybicarbonate?

1 A. Polycarbonate.

2 Q. Oh, just a polycarbonate. And where
3 did you get did polycarbonate?

4 A. From the sheets, I believe I procured
5 that from ET Plastics here in Akron, Ohio,
6 had them slit it for me.

7 Q. And you had it slit did you say in
8 four foot lengths, these were four sheets
9 apparently you bought?

10 A. No, they were forty-eight inch wide
11 by four foot long or six foot long sheets
12 that I had slit into four foot wide
13 sections.

14 Q. Okay. And did you put an adhesive on
15 the back of it?

16 A. Yes.

17 Q. What kind of adhesive did you put
18 on?

19 A. I put a double-faced adhesive on the
20 back side of it.

21 Q. Like a carpet tape?

22 A. Yes.

23 Q. Was it in fact carpet tape?

24 A. Yes.

25 Q. Why did you choose a double-backed

1 tape?

2 A. We wanted something that had two
3 sides.

4 Q. What was the benefit of having --
5 well, okay, I don't want to get into this
6 argument again because the judge has already
7 ruled on it, but why did you want two sides
8 to the tape?

9 A. One side to adhere to the polymer,
10 the underneath side of the floor striping,
11 the other side to adhere to the floor.

12 Q. Okay. Why would you need a cloth
13 layer or some type of an intermediate
14 material between those two faces, if you
15 will?

16 A. I don't know if that's, if it is
17 totally necessary.

18 Q. I mean did you ever consider just
19 rolling adhesive onto the back of the
20 polycarbonate and putting a silicone release
21 liner or something over it and be done with
22 it, back in 2000 through 2003?

23 A. Not that I recall.

24 Q. Where did you get the double-backed
25 tape?

1 MR. COHN: Are you talking about
2 this same time frame?

3 BY MR. WEBER:

4 Q. Oh, yeah, yeah, we're still back in
5 the early days while you were doing this
6 part-time and you were still at Akro-Mils.

7 A. I think we, the early version was
8 Cortape here in Akron, Ohio.

9 Q. From Cortape?

10 A. Cortape.

11 Q. Are they still in business?

12 A. Yes.

13 Q. Where are they located, besides in
14 Akron?

15 A. I don't know. They're not
16 necessarily Akron, I think it's Tallmadge or
17 someplace.

18 Q. Did you actually go to their facility
19 to get the tape?

20 A. Yes.

21 Q. Did you talk to anyone there about
22 what you were intending to use it for?

23 A. I'm sure I probably did.

24 Q. And did they then say, well, here,
25 this ought to fit your bill, or exactly how

1 did you know what double-backed tape to get?

2 A. Okay, when I first started off with
3 the slit sheets, I'm sure I procured that at
4 the hardware store. After putting it onto
5 the product as it was coming out of the
6 extruder, I'm sure I worked with Phil Nye
7 because he had other applications where he
8 did apply tape and that's why we selected
9 Cortape, at least initially.

10 Q. You chose Cortape because that's what
11 Nye was using?

12 A. Had used in the past.

13 Q. Okay. Did you actually make any
14 product while you were still employed at
15 Akro-Mils, while you were doing this
16 part-time?

17 A. Yes.

18 Q. Okay. So you built dies; is that
19 correct?

20 A. Had dies made.

21 Q. Okay, you had dies made and was that
22 through Mr. Nye?

23 A. Yes.

24 Q. And then Mr. Nye fitted those dies to
25 an extruder, is that fair to say?

1 A. Yes.

2 Q. And then he put a bunch of
3 polycarbonate beads up in a hopper and melted
4 them and extruded the plastic, is that fair
5 to say?

6 A. That's correct.

7 Q. Okay. And he extruded it what, onto
8 a conveyor of some sort that's moving this,
9 I call it a web, I'm sure there's a better
10 name, web is what I've always used in dealing
11 with vinyl film, stuff like that, but you
12 were moving this elongated, you were
13 developing this elongated piece, correct?

14 A. That's correct.

15 Q. And that's the reason you wanted to
16 extrude it, because you wanted it to be long,
17 right?

18 A. That's correct.

19 Q. Okay. And that's the reason you went
20 no an extruder, that's the reason you went to
21 Mr. Nye, correct?

22 A. Uh-huh.

23 Q. Did you ever consider any other way
24 of making this long piece of polycarbonate
25 plastic to put adhesive on?

1 A. Yes.

2 Q. What other way did you consider?

3 A. Using the same process but only doing
4 it wider.

5 Q. Okay, doing it wider, which would
6 mean you would have a different die?

7 A. And a larger machine.

8 Q. Okay. I mean but the natural way for
9 you to do this was to extrude it, right?

10 A. Correct.

11 Q. Okay. I mean you didn't have to go
12 see an engineer to know that you'd want to
13 extrude this to make this long web of
14 polycarbonate, correct?

15 A. That's correct.

16 Q. So you were extruding, did you
17 actually go over and observe the production
18 runs, the first ones?

19 A. Yes.

20 Q. Okay. And were these prototypes you
21 were making or did you package this up and
22 sell it to somebody or give it to somebody to
23 see how they liked it?

24 And I apologize, that was a
25 very poor question, I beat you to the punch

1 on that one. Did you -- well, in fact let me
2 just step back.

3 You had the die, we know the
4 die was fitted to the extruder, the extruder
5 was filled with pellets, it was heated up,
6 melted, and you started extruding this
7 polycarbonate strip, and when was the
8 adhesive applied?

9 MR. COHN: Objection.

10 THE WITNESS: After it left the
11 extruder.

12 BY MR. WEBER:

13 Q. Okay. Was there a period of time
14 where you let the extrudate cool down before
15 you applied the adhesive?

16 A. Yes.

17 Q. Did you actually take the extrudate
18 up in a roll and then in a separate process
19 apply the adhesive?

20 THE WITNESS: I think maybe we
21 need to invoke the same procedure we did
22 yesterday.

23 MR. WEBER: All right. Well, I'll
24 come back to that.

25 MR. COHN: I'll designate this

1 answer as --

2 BY MR. WEBER:

3 Q. Well, do you still use the same
4 process?

5 A. What's that?

6 Q. Do you still use the same process?

7 MR. COHN: Objection, same thing.

8 MR. WEBER: Well, no, he didn't
9 say what the process is.

10 MR. COHN: I don't want him
11 talking about what his current process is,
12 whether it's changed or the same.

13 BY MR. WEBER:

14 Q. Okay. If I went out and bought a
15 piece of your material today, would I find it
16 has the double-backed tape on it?

17 A. Yes.

18 Q. All of your products?

19 A. All of the tapes.

20 Q. All of the tapes made in accordance
21 with your '480 patent?

22 A. Correct.

23 Q. But in any event, somehow you
24 extruded this and you got the tape on it, and
25 we're back here, let's talk about your first

1 run, okay, did you take the product and test
2 it?

3 A. Yes.

4 Q. How did you test it?

5 A. Put it down on the floor at Advanced
6 Plastics.

7 Q. Okay. Did it stick to the floor?

8 A. Initially.

9 Q. Okay. That suggests, did it
10 eventually come loose?

11 A. Yes.

12 Q. And why did it come loose?

13 A. One of the things with the
14 polycarbonate is it's a stiff enough material
15 that when it was in a roll, it had a memory,
16 it wanted to come back up after, once it's on
17 the floor.

18 Q. So it's sort of elastic, it wants to
19 recover?

20 A. I don't know if elastic is the
21 correct term, I always called it memory, that
22 it wanted to go back to the form that it was
23 used to.

24 Q. It had been in a roll for quite
25 awhile and so when you laid it down it wanted

1 to roll back up?

2 MR. COHN: Objection.

3 MR. WEBER: Is that correct?

4 MR. COHN: Objection.

5 THE WITNESS: I don't know about
6 roll back up but it wanted to go like this.

7 BY MR. WEBER:

8 Q. It would raise up off the floor?

9 A. Yes.

10 Q. Okay. And the raising up off the
11 floor, that force to your understanding would
12 be sufficient enough to break the engagement
13 of the adhesive, is that correct, or the bond
14 of the adhesive?

15 A. Yes.

16 Q. And I assume you eventually remedied
17 that problem, correct?

18 A. Yes.

19 Q. Okay. How did you do that?

20 A. Well, we looked at a thermoplastic
21 elastomer in its place.

22 Q. In place of the polycarbonate?

23 A. Correct.

24 Q. Phil Nye -- well, strike that.

25 Did Phil Nye explain to you

1 what was happening when it was lifting off of
2 the floor why the polycarbonate was doing
3 that?

4 A. I'm sure we both came to the same
5 conclusion on that.

6 Q. What's Phil Nye's background?

7 A. He's an accountant I believe by
8 trade or finance, he was a banker prior to
9 --

10 Q. Okay.

11 A. -- prior to buying Advanced
12 Plastics.

13 Q. So he's not a chemist?

14 A. No.

15 Q. Is anybody out there a chemist?

16 A. No.

17 Q. So why did you go to a thermoplastic
18 elastomer?

19 A. It was something that Phil had
20 experience with.

21 Q. And what was his experience with it?

22 A. He had just used it before on other
23 products.

24 Q. Well, okay, was his experience that
25 it would not have this memory, I think you

1 said?

2 A. Correct.

3 Q. Okay.

4 MR. COHN: Ray.

5 - - -

6 (Short recess had.)

7 - - -

8 BY MR. WEBER:

9 Q. I want to jump back just for a
10 moment to the Patch Rubber situation. Did
11 you ever receive a sample of the Patch Rubber
12 product?

13 A. No.

14 Q. Okay. Did you get any literature
15 from Patch Rubber regarding this highway tape
16 that you were talking to them about?

17 A. No.

18 Q. Okay. So we'll come back around now
19 to your run, your first run using the
20 thermoplastic elastomer, how did that product
21 work?

22 A. It was too soft.

23 Q. And what do you mean by too soft?

24 A. It received dirt too easily and it
25 was too hard to clean.

1 Q. When you say received dirt, are you
2 talking about the elastomeric surface, the
3 top surface received dirt?

4 A. Well, not only the top surface, the
5 entire profile.

6 Q. I'm struggling with this, and it's
7 probably my fault, not yours, what do you
8 mean by received dirt, you mean dirt got on
9 it, it got embedded in it?

10 A. Embedded in it and it was too
11 difficult to remove it.

12 Q. And how did you determine that that
13 was a problem?

14 A. By testing it out.

15 Q. And where did you run these tests?

16 A. At Advanced Plastics.

17 Q. And what was the nature of the test,
18 just running/driving over it?

19 A. Just put it down and let normal
20 traffic transpire.

21 Q. And when you say normal traffic, did
22 that include skids?

23 A. Yes. Well, it included forklifts
24 moving pallets.

25 Q. Okay.

1 A. Driving over top of it.

2 Q. Okay. Then what did you do next in
3 the development?

4 A. We went to a PVC material.

5 Q. And that's polyvinyl chloride?

6 A. That's correct.

7 Q. And why did you go to PVC?

8 A. It was a harder material and made it
9 easier to clean.

10 Q. And had Phil had any -- I apologize,
11 strike that.

12 Had Phil Nye had any experience
13 with PVC before?

14 A. I don't think so. Well, I'm not
15 sure. With the semi-rigid, this was
16 classified as semi-rigid PVC, I think he
17 produced product with a rigid PVC before, on
18 the bookcases that I mentioned earlier.

19 Q. Who suggested that you go from this
20 thermoplastic elastomer to PVC, semi-rigid
21 PVC?

22 A. I did.

23 Q. Okay. And what was the, what was the
24 basis of your knowledge for doing that?

25 A. Just general literature that's out

1 there available for the different resins and
2 the uses for them.

3 Q. Well, what did the literature tell
4 you about PVC?

5 A. That it's a widely used product
6 that's got characteristics, it had some of
7 the characteristics that I was looking for.

8 Q. And what were those characteristics?

9 A. A hardness that would make the
10 product not become a sponge for dirt.

11 Q. What other characteristics, or was
12 that it?

13 A. That was my concern.

14 Q. So your concern at the time was I've
15 got this thermoplastic elastomer, it's too
16 soft and the dirt gets embedded in it and it
17 won't clean up; is that correct?

18 A. That's correct.

19 Q. And so you said so I think I need a
20 harder material so that the dirt can't
21 penetrate it; is that correct?

22 MR. COHN: Objection.

23 THE WITNESS: Yes.

24 BY MR. WEBER:

25 Q. Okay. And then you went to the

1 literature and you looked for harder
2 materials?

3 MR. COHN: Objection.

4 BY MR. WEBER:

5 Q. Or did you look for materials that
6 are easy to clean or what, what was the
7 characteristic that you were looking for?

8 A. A characteristic that would have the
9 hardness and the cleanability that I wanted
10 of the product.

11 Q. Did the literature tell you that PVC
12 would have the hardness and the
13 cleanability?

14 A. Well, when you get into literature,
15 there's all different types of formulations
16 for different types of resins, and even in
17 the PVC category there's a wide range of
18 different barometers that you can utilize to
19 fulfill whatever outcome you're looking to
20 get to.

21 Q. Well, what, what made you choose this
22 semi-rigid PVC, what did you see in the
23 literature?

24 A. Through, through the development of
25 this project, we had been going through

1 different resins to try to obtain the goal of
2 obtaining a very durable, cleanable, long
3 lasting floor tape.

4 Q. Did either one of you consider
5 getting on the phone and calling a chemist or
6 calling the polymer science department here
7 at the University of Akron and telling them
8 what you were looking for and say what should
9 we use?

10 A. No. I can tell you that in addition
11 to the literature, I had a discussion with
12 one of the PVC resin salesmen, or a resin
13 salesman, not a PVC resin salesman, a resin
14 salesman.

15 Q. And what did he tell you?

16 A. He recommended I should try PVC.

17 Q. Did you tell him you were looking for
18 something that was hard and that would clean
19 easily and not be penetrated by dirt?

20 A. Yes.

21 Q. Did he tell you any particular PVC to
22 try?

23 A. Not to my recollection.

24 Q. Why did you go to semi-rigid instead
25 of rigid PVC?

1 A. Rigid PVC would be too difficult to
2 roll up, probably get us back to the memory
3 thing we talked about earlier with the
4 polycarbonate.

5 Q. So when you -- by the way -- strike
6 that.

7 When you were working for
8 Akro-Mils or for Myers Industries, did you
9 have an employment agreement with them?

10 A. Yes.

11 Q. Did you have an agreement regarding
12 inventions?

13 A. My recollection is yes.

14 Q. Okay. And what was that agreement?

15 A. It was a boilerplate agreement that
16 I'm sure a lot of employees have as far as
17 what resides, you know, trade secrets and
18 whatever belonging to the company that you're
19 working for.

20 Q. Did the people at Akro-Mils know that
21 you were, you had this business going on the
22 side?

23 A. Yes.

24 Q. Who in particular there knew that?

25 A. Jim Daw.

1 Q. Jim Doll?

2 A. Daw, D-A-W.

3 Q. And what was his position?

4 A. He was in charge of inventory
5 management and scheduling at the Wadsworth,
6 Ohio, facility.

7 Q. Was he your supervisor?

8 A. No.

9 Q. Okay. Did any of your supervisors
10 know you were doing this?

11 A. Yes.

12 Q. Okay. Who?

13 A. Joe Pallota.

14 Q. Joe Pallota?

15 A. Yes.

16 Q. How do you spell that?

17 A. P-A-L-L-O-T-A. But he really wasn't,
18 he was quasi a supervisor the way the
19 management structure worked.

20 Q. Well, who did you report to at
21 Akro-Mils?

22 A. He's passed on now, Bill -- I can't
23 remember his last name now but he's passed
24 on. And once he left the company, in the
25 last year and a half, then I reported to Gary

1 McDonald.

2 Q. And what was Gary McDonald's
3 position?

4 A. General manager.

5 Q. Did Mr. McDonald know you were doing
6 this?

7 A. I don't believe so.

8 Q. We're back now to extruding
9 semi-rigid PVC and how did the product that
10 you made with that material prove out?

11 A. It worked very well.

12 Q. And when you did these tests, did you
13 keep records of the evolution of this
14 product?

15 A. No.

16 Q. Why not?

17 A. I was a small company and it wasn't
18 something that was a formalized thing that I
19 said I'll keep track of everything I do.

20 Q. Well, did you keep track of anything
21 you did?

22 A. In what regards?

23 Q. Well, in regards to the conception,
24 reduction to practice, testing of what you
25 claim to be your invention?

1 A. After the product went to market I
2 went back and notated the steps and when they
3 occurred for that product.

4 Q. And was that just testing your
5 memory?

6 A. No.

7 Q. So did you have papers?

8 A. Yes.

9 Q. And what's happened to those papers?

10 A. I have them.

11 Q. Okay. You have the papers from which
12 you made this chronology?

13 A. That I've shared with my lawyers.

14 Q. I don't recall getting any documents
15 from you that deal with conception, reduction
16 to practice, testing, anything of that
17 nature.

18 MR. COHN: Is that a question?

19 MR. WEBER: Were you asked for
20 those documents?

21 MR. COHN: By whom? If by his
22 lawyers, he can't answer.

23 BY MR. WEBER:

24 Q. Well, did you search for those types
25 of documents in, to respond to document

1 requests that we had propounded?

2 A. There are certain documents that are
3 considered privileged.

4 Q. Okay, let me just cut to the chase,
5 when you were working with Mr. Nye, your
6 lawyers weren't standing there with you, were
7 they?

8 A. No.

9 Q. Okay. You weren't even talking to
10 lawyers then, were you?

11 A. No.

12 Q. No, you were talking to people who
13 could provide you with raw materials and you
14 were testing different, different mixes and
15 different batches and adhesives and whatever;
16 is that correct?

17 A. That's correct.

18 Q. Okay. And do you, do you have any
19 documentation that shows those efforts,
20 including purchase orders, letters to
21 suppliers, e-mails with Mr. Nye, anything of
22 that nature?

23 A. Yes.

24 Q. Okay. Did you, did you provide those
25 to your attorneys?

1 A. Yes.

2 MR. WEBER: I'd like to see those.

3 MR. HARDERS: We'll look for them,
4 I'm not sure what he's talking about.

5 BY MR. WEBER:

6 Q. Okay. You know, you've gone around
7 the country suing a lot of people on your
8 patent, haven't you?

9 MR. COHN: Objection.

10 MR. WEBER: Is that fair to say?

11 THE WITNESS: No.

12 MR. COHN: Objection.

13 BY MR. WEBER:

14 Q. You've filed three lawsuits, haven't
15 you, four now, right?

16 A. Four.

17 Q. Have you filed four lawsuits?

18 A. Yes.

19 Q. Okay.

20 MR. COHN: Is there any purpose to
21 this other than trying to --

22 MR. WEBER: And --

23 MR. COHN: Excuse me. Is there a
24 purpose to this line of questioning other
25 than trying to badger the witness?

1 MR. WEBER: No, I'm not badgering
2 the witness, I'm wanting to find out why I
3 haven't gotten documents which are the basic
4 underpinnings of a patent lawsuit, and that
5 is conception, reduction to practice,
6 testing, marketing and things of that nature.

7 I haven't gotten any of that
8 and you're trying to claim attorney/client
9 privilege when he never even knew you existed
10 when he was doing all of this stuff.

11 MR. COHN: I haven't said anything
12 about attorney/client privilege. And if you
13 don't stop raising that angry tone with me,
14 you will not get to go forward any further
15 in this deposition. And especially, I could
16 take the angry tone, but you are not to do
17 that to my witness, do you understand that?

18 MR. WEBER: I'm not going to take
19 instructions from you.

20 MR. COHN: Well, you ought to.

21 MR. WEBER: In fact you're
22 probably the last guy in this room that I'll
23 take any instructions from.

24 MR. COHN: Well, you will take
25 them --

1 MR. WEBER: But let's go forward,
2 let's go forward.

3 BY MR. WEBER:

4 Q. You've filed four lawsuits?

5 A. Yes.

6 Q. Okay. Have you assembled documents
7 regarding the development of your product and
8 the marketing of your product and things of
9 that nature for those lawsuits?

10 A. I'm not sure what you mean by the
11 marketing of my products and how that
12 pertains to the lawsuits themselves.

13 Q. Have you -- what efforts if any did
14 you take when you filed the lawsuits to be
15 sure that all the documents pertaining to
16 your patent and your competitors and the
17 accused products remained and weren't
18 destroyed, what efforts did you take?

19 MR. COHN: What time, at the time
20 of filing?

21 BY MR. WEBER:

22 Q. At the time that you determined to
23 file these lawsuits?

24 A. At the time I determined to file the
25 lawsuits?

1 Q. In fact I'm going to go back even
2 further. When you sent out the letters, when
3 your patent application published years ago,
4 did you take efforts from that date forward
5 to secure and maintain documents?

6 A. That's a very broad question, what
7 documents?

8 Q. Any documents dealing with, with
9 your patented product and the activities of
10 any of your competitors that you've sued, I
11 want to know what efforts you took to secure
12 and maintain relevant documents?

13 A. Relevant documents pertaining to
14 what?

15 Q. Well, let's talk about the e-mails
16 and that that you had, that you said that
17 you've given to your attorneys, what, you
18 know, things of that nature, your
19 communications with Mr. Nye, your efforts to
20 market the product, to offer it for sale, to
21 advertise it, to promote it, did you keep
22 those records?

23 A. I have those records.

24 Q. Okay. Why haven't I seen those
25 records?

1 MR. COHN: Objection.

2 THE WITNESS: I don't know why you
3 need my marketing records.

4 MR. WEBER: You don't need to know
5 why I need them but in any event, let's go
6 forward.

7 BY MR. WEBER:

8 Q. So you were satisfied with the test
9 that you ran on the PVC material, correct?

10 A. That's correct.

11 Q. And that satisfaction was based on
12 tests that you ran at Advanced Plastics,
13 correct?

14 A. Yes.

15 Q. Did you run any tests outside of
16 Advanced Plastics?

17 MR. COHN: At that time?

18 BY MR. WEBER:

19 Q. I'm still talking about when you
20 first went to the PVC material that you said
21 worked well.

22 A. Yes, at Chemsultants.

23 Q. And when did you run tests at
24 Chemsultants or have them run tests?

25 A. July of 2003.

1 Q. Did you make any installations of
2 this product in any warehouses or factories
3 in the 2001 -- or 2000 to March 2003 period?

4 A. We sold some of the non-working
5 product.

6 Q. Who did you sell it to?

7 A. Different customers, I don't recall
8 the names of them.

9 Q. When did you make your first sale?

10 A. Of?

11 Q. Of the non-working product.

12 A. Probably in 2001 sometime.

13 Q. Who was the customer?

14 MR. COHN: Objection.

15 THE WITNESS: I don't remember.

16 BY MR. WEBER:

17 Q. You can't remember any of customers
18 that you sold to?

19 A. I do have records.

20 Q. You didn't think that would be
21 important?

22 MR. COHN: Objection, you're
23 arguing with him now.

24 MR. WEBER: No, I'll tell you
25 what, I'm really upset and I think the Court

1 is going to be upset about what I'm hearing
2 right now.

3 MR. COHN: Yeah?

4 MR. WEBER: Yeah.

5 BY MR. WEBER:

6 Q. You understand that we claim, we
7 meaning Defendants, claims that your patent
8 is invalid, don't you?

9 A. I understand that.

10 Q. And that's in our answer and
11 counterclaim, right?

12 A. Yes.

13 Q. And you're here today to testify with
14 regard to the answer and counterclaim,
15 correct, that was in schedule A, correct?

16 A. Yes.

17 Q. Now, if I remember your testimony
18 earlier, you hadn't seen that before I
19 handed it to you, is that correct, that
20 schedule A?

21 A. If I had, it was one of many.

22 Q. So around 2001 you sold, what made
23 this product non-working?

24 A. The polycarbonate?

25 Q. Right.

1 A. It chipped, had memory.

2 Q. How much of it did you sell?

3 A. Not much.

4 Q. Well, how much?

5 A. Ballpark?

6 Q. Ballpark.

7 A. Lucky to be a thousand dollars, if
8 that.

9 Q. Was it to someone locally?

10 A. No.

11 Q. Where, did you have to package it,
12 did you have to package and ship it?

13 A. Yes.

14 Q. Are you starting to recall who you
15 shipped it to or who you sold it to?

16 A. No.

17 Q. How many sales did you make in 2001
18 of this non-working product?

19 A. How many?

20 Q. Right.

21 A. Maybe four, maybe five.

22 Q. And was each one of them in about the
23 thousand dollar range of sale?

24 A. No.

25 Q. Were there larger ones?

1 A. No.

2 Q. Are you saying that the total amount
3 of sales was about a thousand dollars?

4 A. That would be my recollection, yes.

5 Q. But you'd have documents that would
6 prove that, right?

7 A. Yes.

8 Q. And those are documents that you've
9 given to your attorneys?

10 A. They were not part of the '480
11 patent.

12 Q. Oh, they weren't?

13 A. No.

14 Q. They were part of the development of
15 the '480 patent product, weren't they?

16 A. They were part of our development
17 efforts to get to a patent.

18 Q. Did you tell the Patent Office about
19 those earlier sales?

20 MR. COHN: Why don't you ask if
21 he ever told the Patent Office anything
22 first.

23 MR. WEBER: Thanks for your
24 coaching but I'll --

25 MR. COHN: It's not coaching.

1 MR. WEBER: Coaching me, I'm not
2 talking about him, thanks for coaching me but
3 I'm not ready to go in yet, okay, I've still
4 got my warmup jacket on.

5 Did you ever tell the Patent
6 Office, did you ever tell the Patent Office
7 about these prior sales of the non-working
8 product?

9 MR. HARDERS: Objection.

10 THE WITNESS: No, because I did
11 not think they were relevant.

12 BY MR. WEBER:

13 Q. And the reason you thought they were
14 not relevant was what?

15 A. Because in combination with the '480
16 patent, they did not have the thickness, they
17 did not have the hardness that we were
18 looking for, they did not have the
19 combination of products to make it a viable
20 working product.

21 And one of the things that I
22 did know that as far as a patent that you
23 have to have is a working product, you can't
24 file a patent on something that doesn't
25 work.

1 Q. Who ever told you that?

2 A. That was my reading of it.

3 Q. Where did you read that?

4 A. In U.S. patent literature that's
5 widely available on the Web.

6 Q. Well, I've been doing this for 41
7 years and that's the first time I've ever
8 heard that as a requirement but...

9 MR. COHN: Now why would you say
10 that?

11 MR. WEBER: Well, I would say it
12 because it's true.

13 MR. COHN: Well, who cares what
14 you know and --

15 MR. WEBER: I do.

16 MR. COHN: Then keep it to
17 yourself. You've been doing this long enough
18 that you know better. I'm not going to let
19 you badger my witness, we're not going to
20 allow it. I'm telling you right now, Ray,
21 you want to play that game, you will not be
22 allowed to do it.

23 BY MR. WEBER:

24 Q. Where did you read the literature,
25 where did you find that literature?

1 A. On a website.

2 Q. So you made some sales in about 2001,
3 what were the next sales that you made?

4 A. We made some sales in 2002 also.

5 Q. Tell me this, who is the first
6 customer that you can recall having sold
7 product to?

8 MR. COHN: And I just want to be
9 sure that this isn't something that I have to
10 ask your client to leave for, is that
11 proprietary or are you comfortable?

12 THE WITNESS: That's proprietary.

13 BY MR. WEBER:

14 Q. Okay, it's proprietary of who you
15 sold -- was it a non-working product?

16 A. It's proprietary.

17 Q. No, was the product non-working, the
18 next one?

19 A. Yes.

20 Q. The first sale sale that you can
21 recall, it was of a non-working product?

22 A. Yes.

23 Q. And when was that sale?

24 A. In 2001.

25 Q. Okay. And you can recall the

1 customer of that product?

2 A. No.

3 Q. Okay, I apologize, maybe I've run
4 around the barn here.

5 Okay, I want you to think of
6 the first customer that you sold product to
7 during this development effort, okay, that
8 you can recall the identity of the customer,
9 do you have that in mind?

10 A. Uh-huh.

11 Q. Was that product a non-working
12 product?

13 A. Yes.

14 Q. And what was non-working about it?

15 A. It did not clean up well, it was too
16 soft, or depending on which version you're
17 looking at, the thermoplastic elastomer
18 product was too soft, too difficult to clean
19 up and too thick.

20 Q. And when were -- now the sale that
21 you have in mind, where you can recall who
22 you sold it to, what year was that sale
23 made?

24 A. In 2002.

25 Q. Okay. So you made some out of

1 polycarbonate and you sold that; is that
2 correct?

3 MR. COHN: Objection, why do you
4 keep going over the same ground over and over
5 and over?

6 MR. WEBER: Because now I'm
7 bringing out the material, previously I
8 hadn't talked about the material.

9 MR. COHN: He already testified to
10 that.

11 MR. WEBER: Well, that's fine, you
12 just hang in there.

13 BY MR. WEBER:

14 Q. You sold some that was made with
15 polycarbonate, right?

16 A. That's correct.

17 Q. And you sold some that was made with
18 the thermoplastic elastomer, right?

19 A. That's correct.

20 Q. And then you sold some that was made
21 with the PVC material, correct?

22 A. That's correct.

23 Q. And when did you decide that you
24 wanted to file a patent application?

25 A. After sales of that particular

1 product enjoyed considerable success, in the
2 spring of 2003.

3 Q. What do you mean, enjoyed
4 considerable success?

5 A. It was displayed at I believe it was
6 the February of 2003 Material Handling Show
7 in Chicago and enjoyed considerable interest
8 from the attendees that were there and as a
9 result the following sales under the name
10 DuraStripe product.

11 Q. Now, were the products that you were
12 selling made by Advanced Plastics?

13 A. Yes.

14 Q. Was the DuraStripe product made by
15 Advanced Plastics?

16 A. Yes.

17 Q. Is DuraStripe a trademark?

18 A. Yes.

19 Q. Who owns that trademark?

20 A. Ergomat.

21 Q. So when did Ergomat enter this
22 picture?

23 A. December of 2002.

24 Q. And how did that come about?

25 A. An agreement between Advanced

1 Plastics and Ergomat.

2 Q. And what was the nature of the
3 agreement?

4 A. That Ergomat would only buy product
5 from Advanced Plastics and Advanced Plastics
6 would only sell what became the '480 patent
7 to Ergomat.

8 Q. So you had an exclusive arrangement?

9 MR. COHN: Objection.

10 BY MR. WEBER:

11 Q. I mean is that correct?

12 A. I didn't.

13 Q. Well, Ergomat and Advance Plastics
14 had an exclusive arrangement?

15 A. That's correct.

16 Q. And where did Advanced Plastics get
17 the right to enter into such an agreement
18 with Ergomat with regard to your product?

19 A. I was onboard with it.

20 Q. And what was in it for you?

21 A. I received a royalty on every foot
22 sold.

23 Q. How much of a royalty?

24 MR. WEBER: Well, I'll tell you
25 what, if you plan on using this at trial as a

1 basis for damages, you'd better be willing to
2 say it in front of the guy you're trying to,
3 whose pocket you're trying to dig into.

4 Now if you want me to ask him
5 to leave the room, then we'll wrestle with
6 whether or not you can present this evidence.

7 THE WITNESS: Yes, I want you to
8 have him leave the room.

9 MR. WEBER: Okay, we'll come back
10 to this. No, stay there.

11 MR. COHN: If he was presenting it
12 even to you, your argument would have some
13 substance, but as it is it's not. We always
14 deal with confidential information under a
15 protective order that then has to come out at
16 trial.

17 MR. WEBER: That would have to
18 come out at trial.

19 MR. COHN: That may be, but it
20 doesn't have to come out in front of your
21 client today, that's what the protective
22 order is for. There's nothing in that
23 protective order that says things that can be
24 protected may not be used at trial.

25 BY MR. WEBER:

1 Q. Who controlled the quality of the
2 goods or of the products sold under the
3 DuraStripe mark, was that you?

4 A. Advanced Plastics.

5 Q. Advanced Plastics controlled the
6 quality?

7 A. Yes.

8 Q. And how did you get involved with
9 Ergomat?

10 A. Phil Nye knew of a gentleman that
11 worked at Ergomat.

12 Q. Was that a personal relationship or a
13 business relationship?

14 A. Business.

15 Q. And what was the nature of the
16 business of Ergomat at this point in time?

17 A. They sold ergo mats, mats that are
18 supposed to be ergonomic, that reduce the
19 stress of standing for long periods of time
20 on concrete.

21 Q. Where was your first sale or to whom
22 was your first sale of the PVC material
23 product?

24 A. Kmack Manufacturing.

25 Q. And where are they located?

1 A. They're in Illinois.

2 Q. And did you have a contact at Kmack?

3 A. Yes.

4 Q. And what's that contact's name?

5 A. Evan Skytie.

6 Q. Can you spell that?

7 A. S-K-Y-T -- I'm not sure if it's I-E
8 or something like that.

9 Q. And how do you know Mr. Skytie?

10 A. He purchased the floor tape from me.

11 Q. So your first contact with him was an
12 effort for you to sell the tape to him?

13 A. Yes.

14 Q. Did you just make a cold call or how
15 did you go about this?

16 A. I did a considerable amount of cold
17 calls; I'm not a hundred percent sure how the
18 first contact came about.

19 Q. Did you send out any mailings?

20 A. Yes.

21 Q. Do you have copies of those?

22 A. Samples of what they looked like.

23 Q. Do you have a mailing list?

24 A. No.

25 Q. Did you have a mailing list?

1 A. Yes.

2 Q. What happened to it?

3 A. Over time, ten years old...

4 Q. Could you -- when did these mailings
5 go out?

6 A. Throughout the 2002 time period.

7 Q. Did you ever do any mailings with
8 regard to your thermoplastic elastomeric
9 product?

10 A. Yes.

11 Q. And did you do similar mailings for
12 the polycarbonate product?

13 A. I believe so.

14 Q. Did you also do cold calls for all
15 those products?

16 A. Yes.

17 Q. Before you started on your endeavor
18 to develop this product, did you do some sort
19 of an assessment as to what competing
20 products might be available?

21 A. I had an understanding of what was
22 out there.

23 Q. And how did you gain that
24 understanding?

25 A. Just by my experience working at

1 different places that I did, as far as the
2 availability of the thinner 3-M floor tapes
3 that are out there and knowing that there did
4 not seem to be a product out there which I
5 was seeking to obtain that was very durable,
6 long lasting, easy to clean, stayed down
7 well.

8 Q. Had you obtained samples of the
9 various products that were out there to find
10 out if they were durable, long lasting, easy
11 to clean and would stay down well?

12 A. Not to my recollection. I mean
13 probably I procured some of the 3M, the
14 thinner tape.

15 Q. And did you procure them from 3M?

16 A. Probably Granger.

17 Q. Did you do any searching on the
18 Internet?

19 A. Yes.

20 Q. And what did you find on the
21 Internet?

22 A. Basically the 3M genre of product
23 that was out there for floor tape marking,
24 which is very thin tape that does not hold up
25 all that well underneath work traffic.

1 Q. Did you keep any results of your
2 searching, I mean did you print out
3 anything?

4 A. I have the results from 3M tape from
5 the Chemsultants study that they did that
6 compared our product to a comparable thin
7 tape.

8 Q. But when you were doing your Internet
9 searching, did you keep a list of what you
10 found and who you found?

11 A. No.

12 Q. Did you do any patent searches?

13 A. Yes.

14 Q. Okay. Did you do those searches
15 yourself?

16 A. No.

17 Q. Did you have an attorney do them?

18 A. Yes.

19 Q. Who was the attorney?

20 A. Hoffman, I think Hoffman, Hinks,
21 Watts.

22 Q. Watts, Hoffmann, Fisher & Heinke?

23 A. That's it.

24 Q. And who with that firm?

25 A. I don't remember.

1 Q. Do you have that search, did you keep
2 that search -- strike that.

3 Did you keep the search
4 results?

5 A. Yes.

6 Q. And you still have those?

7 A. Yes.

8 Q. And that was a search for prior art,
9 right?

10 A. Yes.

11 Q. Did there ever come a time that you
12 believed that you should have provided that
13 to me?

14 MR. COHN: Objection.

15 THE WITNESS: I believe it's
16 lawyer/client privilege.

17 BY MR. WEBER:

18 Q. You believe that's lawyer/client
19 privilege?

20 A. Yes.

21 Q. Even the identity of the patents is
22 attorney/client privilege?

23 MR. WEBER: You know, I'd like to
24 see a privilege log, by the way, which I
25 don't think I've ever seen.

1 MR. COHN: Neither have we, so
2 maybe we both need to do that.

3 BY MR. WEBER:

4 Q. So you had a search done by somebody
5 at Watts, Hoffmann, Fisher & Heine, correct?

6 A. That's correct.

7 Q. Was it either one of the four named
8 people, I know it wasn't Watts because he's
9 gone, Fisher might have been alive then,
10 Lowell Heinke?

11 A. I don't recall.

12 Q. Okay. Well, after you had the
13 search commissioned what, did you believe
14 that there was some opening in the market
15 for your product, for a product that you
16 envisioned?

17 MR. COHN: Objection, are you
18 connecting the receptiveness of the market to
19 the search in some way? I mean I don't
20 understand.

21 BY MR. WEBER:

22 Q. To the prior art. You developed an
23 understanding of the prior art before you
24 filed your patent application, correct?

25 A. That's correct.

1 Q. And you actually developed an
2 understanding of the prior art before you did
3 your development effort, didn't you?

4 A. Yes.

5 Q. Okay. I mean were you looking to see
6 if there was an area in the landscape of the
7 prior art that might be available for you, is
8 that what you were doing?

9 MR. COHN: Objection.

10 THE WITNESS: No.

11 BY MR. WEBER:

12 Q. Okay, what were you doing, what was
13 your goal?

14 A. To see if the product I was
15 attempting to make would be patentable.

16 Q. So you already had pretty firmed up
17 what your product would be before you had the
18 search run?

19 A. Yes.

20 Q. And describe that product to me?

21 A. A very durable, long lasting floor
22 tape that is easy to clean, that saves time
23 for the people putting it down as opposed to
24 painted floor lines or cheaper, thinner
25 tapes.

1 Q. Okay. Those are attributes of the
2 product, I'd like for you to describe the
3 physical characteristics of the product to
4 me.

5 What are the physical
6 characteristics of the product that you
7 envisioned when you had your search run?

8 MR. COHN: Don't let him rush you,
9 just answer his question.

10 MR. WEBER: I don't think I could
11 have asked that question any more softly or
12 slowly.

13 MR. COHN: While he was thinking
14 about how to answer it you asked him again
15 because you were impatient.

16 MR. WEBER: No, I asked it again
17 because, you know, he must not have
18 understood my question.

19 MR. COHN: No, he must have been
20 trying to make sure he gave a good answer.

21 MR. WEBER: Okay, it might be good
22 in your mind but anyhow, go ahead.

23 MR. COHN: Good is a truthful
24 answer and that's all he does.

25 MR. WEBER: Well, have you

1 answered my question? I'm fine with that
2 answer if that's the answer you want to stick
3 with.

4 MR. COHN: What answer?

5 THE WITNESS: What answer?

6 MR. WEBER: The answer that he
7 just gave me.

8 THE WITNESS: I didn't give an
9 answer.

10 MR. COHN: No.

11 THE WITNESS: I didn't give an
12 answer.

13 MR. COHN: He was thinking about
14 his answer and you asked it again as though
15 you were impatient, in an effort to rush him
16 along and make him nervous.

17 MR. WEBER: All right.

18 MR. COHN: I don't like when you
19 do that so I commented on it.

20 MR. WEBER: Take your time.

21 THE WITNESS: And what's the
22 question again?

23 MR. WEBER: I asked it twice, you
24 don't remember it? I'll ask the reporter to
25 read it back.

1 (Previous testimony read back as requested.)

2 THE WITNESS: A product that had
3 the characteristics that would give me those
4 things that I talked about, easy to clean,
5 very durable, and long lasting.

6 BY MR. WEBER:

7 Q. And what are those physical
8 characteristics?

9 A. They are the '480 patent.

10 Q. So you had in mind what's disclosed
11 and claimed in the '480 patent when you asked
12 for the search to be done, is that your
13 testimony?

14 A. No, that's incorrect.

15 Q. Okay.

16 A. I'm saying that through time, through
17 development of this product, I was not aware
18 of just what physical characteristics of a
19 product would get me the features of what I'm
20 trying to obtain.

21 When I applied for the patent I
22 was looking for -- not the patent, when I had
23 the patent search done, I was looking to see
24 if looking at the landscape, if you will, to
25 see if there was an opportunity to obtain a

1 patent.

2 Q. The reason you didn't have a physical
3 structure in mind is because when you started
4 on this venture you weren't a person of any
5 skill in this art, is that fair to say?

6 MR. COHN: Objection.

7 THE WITNESS: No.

8 BY MR. WEBER:

9 Q. Okay. What was your skill level in
10 this art when you started on this venture?

11 A. I had overall knowledge of the use of
12 floor paint and thinner floor tapes, so that
13 was one thing. I saw that there was a need
14 in the marketplace for something that was
15 more durable and heavy duty.

16 Q. Anything else?

17 A. That should do it.

18 Q. Why didn't you just go with PVC
19 material right out of the chute?

20 A. Because I didn't know at that time.

21 Q. Why didn't you just go with
22 thermoplastic elastomer right out of the
23 chute?

24 A. Because I didn't know.

25 Q. Because you really hadn't had any

1 involvement in this technology at all when
2 you embarked on this project, isn't that fair
3 to say?

4 A. I guess it's fair to say, if you want
5 to go down the path that you're talking
6 about, saying that I didn't have a chemical
7 background or I didn't have an engineering
8 background.

9 Q. I don't mean that in a demeaning
10 sense, and I mean that sincerely, I don't
11 have an accounting background, you can do a
12 lot of things I can't do. I just see what
13 you did here, I take you at least for now at
14 your word on the developmental process, I was
15 just trying to understand why we went through
16 the various iterations.

17 And I would also I guess now
18 ask, why did you sell to customers the
19 polycarbonate product that didn't work well
20 at all, why did you sell it to them?

21 MR. COHN: Let me just object
22 because of the long preface to your question;
23 the question itself isn't objectionable.

24 BY MR. WEBER:

25 Q. Well, you understood the question

1 when I actually moved to the question?

2 In fact let me just, let me do
3 it again, you've said that the polycarbonate
4 product was non-functioning, I think is how
5 you characterized it; is that correct?

6 A. Yes.

7 Q. Why did you sell it?

8 A. Because I learned that over time,
9 both being tested at the place where we
10 manufactured it and selling it.

11 Q. And the same thing for the
12 thermoplastic elastomer, you characterized
13 that as non-functioning and yet you sold it,
14 right?

15 A. But at the time I believed it to be a
16 perfectly viable product.

17 Q. You were obviously satisfied with it
18 when you sold it, right?

19 A. At the time.

20 Q. Okay.

21 A. Until I received feedback that it
22 wasn't what I had hoped it to be.

23 Q. Well, you wouldn't have sold any of
24 these products if you hadn't been satisfied
25 with them, correct?

1 A. That's correct.

2 Q. Okay.

3 A. That's correct.

4 (Discussion had off the record.)

5 - - -

6 (Luncheon recess had.)

7 - - -

8 (Defendant's Exhibit

9 No. 3 was marked

10 for identification.)

11 BY MR. WEBER:

12 Q. Do you recognize Exhibit 3?

13 A. Yes.

14 Q. Okay. And what is Exhibit 3?

15 A. It's the '480 patent.

16 Q. And that's the patent in suit?

17 A. That is correct.

18 Q. Okay. I don't want to spend a whole
19 lot of time on the patent itself but if
20 you'll turn to -- in fact you've reviewed
21 this patent, you're very familiar with it,
22 correct?

23 A. I'm familiar with the patent, yes.

24 Q. Okay. If you'll go to column two, it
25 talks about, down around line 21 it says,

1 "Advantageously, this embodiment of the
2 invention provides improved tear resistance,
3 strength and abrasion resistance by employing
4 the sum of all of the combination" --

5 MR. COHN: Sum or all.

6 BY MR. WEBER:

7 Q. "Sum or all of the combination of
8 polymer selected, Shore A hardness, textured
9 surface and layer thickness." Did I read
10 that correctly?

11 A. Yes.

12 Q. Okay. And what was the textured
13 surface, I haven't heard that topic so far
14 today, what's the significance of a textured
15 surface?

16 A. That was where you could feel it,
17 feel it to the touch of the product.

18 Q. Okay. So if it was perceptible by
19 feel to you would be a textured surface?

20 A. Yes.

21 Q. Okay. And what's the significance of
22 it, why is textured surface important, or is
23 it?

24 A. It's on our patent. It measured --
25 not measures but it's just an attribute of

1 the product that you can feel, for instance
2 the bevelled edge.

3 Q. Okay. Well, your patent doesn't say
4 anything at all about a bevelled edge, does
5 it?

6 A. No, it doesn't.

7 Q. In fact, well, let me ask you this,
8 had you considered using a bevelled edge
9 before you filed this patent application?

10 A. Yes.

11 Q. Okay. And what were the benefits of
12 a bevelled edge?

13 A. That as skids are pushed over it it's
14 less likely -- it will help ride the skid
15 over it.

16 Q. And you were aware of that before you
17 prepared this patent application or had this
18 patent application prepared, correct?

19 A. Yes.

20 Q. Okay. Is there any reason why that's
21 not mentioned in your patent anywhere, the
22 fact that there's no mention of pallets and
23 forklifts or anything of that nature going
24 across the tape and damaging it?

25 A. There's no reason to my knowledge why

1 it's not there.

2 Q. When did you first add a tapered edge
3 to your product or was it in the product from
4 the beginning?

5 A. It was in the product from the
6 beginning.

7 Q. Then why isn't it shown in your
8 patent?

9 A. Because we didn't include it when we
10 filed it.

11 Q. No, I understand that, I assume the
12 Patent Office didn't make a mistake, but why
13 did you not include the tapered edge?

14 A. I worked with my attorney at the
15 time, the product that we had tested at
16 Chemsultants had the tapered edge, I turned
17 the information over and we filed the
18 patent.

19 Q. Well, you reviewed the patent
20 application before it was filed, didn't you?

21 A. Yes.

22 Q. And you approved it, right?

23 A. Yes.

24 Q. You signed the patent application,
25 not your attorney, correct?

1 A. Yes.

2 Q. Did you ever say to your attorney why
3 isn't the tapered edge in there?

4 MR. COHN: Objection, you know you
5 can't ask him that.

6 MR. WEBER: No, he already told me
7 that, and his attorney is only a conduit
8 between him and the Patent Office and that's
9 something that should have been disclosed and
10 I want to know, I am entitled to know that.
11 I'm not asking for advice.

12 MR. COHN: No, you're asking what
13 he indicated to his attorney and back and
14 forth and you're not entitled to that.

15 MR. WEBER: Are you instructing
16 him not to answer?

17 MR. COHN: Absolutely.

18 MR. WEBER: Okay.

19 BY MR. WEBER:

20 Q. Did you make any changes to the
21 patent application draft you got from your
22 attorney?

23 A. No.

24 Q. Did you read it?

25 A. Yes.

1 Q. Did you ask yourself, I wonder why
2 the tapered edge isn't in there?

3 A. No.

4 Q. Did you ask yourself, why isn't there
5 any mention of being torn by pallets or skids
6 or forklifts or things of that nature, did
7 you ask about that?

8 MR. COHN: Ask who, the attorney?

9 BY MR. WEBER:

10 Q. Yourself, no, yourself?

11 A. Well, here I'm reading, "One
12 disadvantage is that the tape lacks
13 sufficient strength and hardness to prevent
14 wear and tear, cracking and breakage from
15 heavy and repeated traffic, such as from
16 forklift trucks." I think it's in there,
17 Ray.

18 Q. Well, is there anything in there
19 about the tapered edge in that regard?

20 A. No.

21 Q. What's the purpose of the tapered
22 edge?

23 A. I just answered that before.

24 Q. Just tell me again, I forgot, I
25 genuinely did.

1 A. Let the record show that I answered
2 him before.

3 Q. No, I want an answer now so I can
4 continue with my inquiry, tell me again.

5 MR. COHN: Tom, usually we're we
6 accommodating up to a point, so this is the
7 second time he's asked you but go ahead.

8 THE WITNESS: With the bevelled
9 edge, with the scraping of pallets over the
10 top of it, it's more likely they will glide
11 over the top of it rather than catch on the
12 edge.

13 BY MR. WEBER:

14 Q. And that's not in here, right, in the
15 patent?

16 A. No.

17 Q. Or yes it's not in there, correct,
18 that was my fault?

19 A. The mention of the bevelled edge is
20 not in the patent.

21 Q. But you had told your attorney about
22 it, correct?

23 MR. COHN: Objection.

24 MR. WEBER: He already answered
25 that, you can keep objecting.

1 MR. COHN: Well, he's not going to
2 answer it again.

3 MR. WEBER: Again, okay.

4 MR. COHN: And I don't think he
5 did, if he did it was my mistake and that was
6 inadvertent and we're not doing it over
7 again.

8 BY MR. WEBER:

9 Q. What else, what else is missing from
10 your patent that you believe was a part of
11 your invention when you asked your attorney
12 to prepare a patent application?

13 MR. COHN: All right, using the
14 word else, you are accepting there was
15 something to begin with and that makes the
16 question objectionable and inappropriate.

17 BY MR. WEBER:

18 Q. Well, what beyond the tapered edge
19 was left out of the patent application?

20 MR. COHN: Same objection, just
21 because it's in there doesn't mean you should
22 say it's left out.

23 BY MR. WEBER:

24 Q. Go ahead.

25 A. I believe I filed a viable patent

1 application based on the properties specified
2 in the '480 patent.

3 Q. Did the -- I'm sorry, go ahead?

4 A. No, I'm sorry.

5 Q. Did the product that, well, that you
6 sold, you first sold with the PVC material,
7 made of the PVC material that you found to be
8 successful, did that have a tapered edge?

9 A. Yes.

10 Q. In the literature that you sent out
11 for your mailings -- that I'm hoping to see
12 sometime -- did that mention the bevelled
13 edge?

14 A. No.

15 Q. Why not?

16 A. The literature included a sample of
17 the floor tape.

18 Q. What did the bevelled edge say about
19 the product?

20 MR. COHN: Objection.

21 BY MR. WEBER:

22 Q. I'm sorry, what did the literature
23 say about the product?

24 A. Durable floor tape.

25 MR. COHN: Can you give me one

1 minute? There's no question pending.

2 MR. WEBER: Go ahead.

3 (Discussion had off the record.)

4 BY MR. WEBER:

5 Q. You told me that the polycarbonate
6 material was, was the material that had the
7 memory issue; is that correct?

8 A. That's correct.

9 Q. Okay. And you said it was a real
10 hard, stiff material?

11 A. That's correct.

12 Q. What would be the Shore A hardness of
13 the polycarbonate?

14 A. I don't know.

15 Q. It would be above 92, wouldn't it?

16 A. I don't know.

17 Q. It's your testimony that you don't
18 know that polycarbonate would have a Shore A
19 hardness above 92?

20 A. I believed it would have a Shore A
21 hardness above 92.

22 Q. In fact you know it has a Shore A
23 hardness above 92, don't you?

24 A. No, not explicitly.

25 Q. You certainly wouldn't be surprised

1 if it did though, correct?

2 A. That's correct.

3 Q. And when you got this polycarbonate
4 material, was that the material you cut into
5 strips?

6 A. The first go-round, yes.

7 Q. Okay. Did there come a point in time
8 when you actually extruded it?

9 A. Yes.

10 Q. Did you extrude it with the same
11 extruder die that you ultimately extruded the
12 thermoplastic and the PVC?

13 A. No.

14 Q. What was the nature of the die that
15 you used with the polycarbonate?

16 A. It was a die used for the
17 polycarbonate that was thicker.

18 Q. Okay, how thick was it?

19 A. Seventy to eighty-five thousandths.

20 Q. And how thick was the die for the
21 thermoplastic elastomer?

22 A. Seventy to eighty-five thousandths.

23 Q. And for the PVC material?

24 A. Sixty-five thousandths.

25 Q. Was there a reason that you had the

1 polycarbonate and the thermoplastic elastomer
2 thicker?

3 A. It was the first ones that we made.

4 Q. And that was you just sort of guessed
5 at what the thickness should be?

6 A. We revised the thickness to lower the
7 trip hazard.

8 Q. When did you lower that thickness?

9 A. When we changed from thermoplastic to
10 the PVC.

11 Q. Okay. So if you had, if you had
12 wanted to stay with the polycarbonate, you
13 could have lowered that thickness, is that
14 fair to say?

15 A. But we would have still run into the
16 problems we had with the product itself.

17 Q. No, I understand that, but there was,
18 there was nothing that kept you from reducing
19 the thickness of the polycarbonate or the
20 thermoplastic elastomer, was there?

21 A. I know of nothing that would have
22 restricted us from doing that.

23 Q. Okay. When you filed your patent
24 application were you aware of your duty of
25 candor before the Patent Office?

1 A. Yes.

2 Q. And how did you become aware of that?

3 A. Through consultation with my
4 attorney.

5 Q. Look in column four of the '480
6 patent, well, the bottom of column three,
7 bridging three and four, there's that chart,
8 do you see chart?

9 A. Uh-huh.

10 Q. What's the, I think, what is that,
11 sigma, the standard deviation sign, what is
12 that, what is standard deviation?

13 A. Well, any time you do anything there
14 is typically a bell curve and within a
15 certain percentage, certain things fall
16 within one, the bell curve, you typically
17 divide it in one section, two sections and
18 three sections.

19 And as you get further into
20 something that's at wide variance from what
21 you would be -- well, I don't know how to
22 explain it.

23 Q. I'm following you, keep going. I
24 know what it is, I want you to explain it on
25 the record.

1 A. It's just a measure of how consistent
2 measurements are and if there are outliers or
3 not based on the measurement that's being
4 performed.

5 Q. And where do the numbers on this this
6 chart come from?

7 A. These were from the Chemsultants
8 testing of the '480 patent product that we
9 submitted.

10 Q. Did that product have a tapered edge?

11 A. Yes.

12 Q. Did you ever sell any of the '480
13 patent product without a tapered edge?

14 A. No. Well, I take that back, we had
15 it, for certain customers that would request
16 one inch wide product for whatever, we would
17 slit it and as a result of that it wouldn't
18 have a tapered edge on it.

19 Q. It would have one tapered edge?

20 A. It would have no tapered edge.

21 Q. Okay. That I assume was a very, very
22 small quantity?

23 A. Inconsequential.

24 Q. Did you understand your obligation to
25 disclose the best mode for carrying out your

1 invention when you filed your patent
2 application?

3 MR. COHN: Objection.

4 THE WITNESS: I don't understand
5 what you mean by best mode.

6 BY MR. WEBER:

7 Q. Okay, so that term is sort of new to
8 you?

9 A. Yes. And something just occurred to
10 me, best mode, if I understand it correctly,
11 is when you file a patent application, you
12 specify those, the qualities or the, the
13 claims in the product that you had the most
14 success with building that product.

15 Q. Well, since the non-tapered edge
16 product was inconsequential, wouldn't it be
17 fair to say that you had the best success
18 with a product that had a tapered edge?

19 A. I don't know how to answer that.

20 Q. I bet you don't.

21 MR. COHN: Objection, move to
22 strike. Keep it up, we'll get out of here.

23 MR. WEBER: Just answer, give me
24 your best answer, or if you can't answer,
25 tell me you can't.

1 MR. COHN: He already told you
2 that.

3 MR. WEBER: He said he doesn't
4 know how to answer it.

5 MR. COHN: Right, and then you
6 made your snide comment.

7 MR. WEBER: Well, I think my
8 comment was very accurate.

9 MR. COHN: It was snide, whatever
10 it was, it should be beneath you.

11 THE WITNESS: The reason I say
12 that is that we never sold a non-tapered
13 product other than what we just have gone
14 over.

15 BY MR. WEBER:

16 Q. Okay.

17 A. So what you're asking me to do is to
18 come to a conclusion on something I've never
19 done and to say oh, yeah, I agree with you.

20 Q. Is that your answer?

21 A. That's my answer.

22 MR. WEBER: Okay, good, let's take
23 a look at --

24 (Defendant's Exhibit

25 No. 4 was marked

1 for identification.)

2 BY MR. WEBER:

3 Q. Now, do you recognize Exhibit 4?

4 MR. COHN: And you should look at
5 all of it.

6 THE WITNESS: Okay.

7 MR. WEBER: I'll tell you what
8 what, I'll withdraw that question.

9 BY MR. WEBER:

10 Q. You have before you Exhibit 4, would
11 you look at the last page and tell me if
12 that's your signature and that's the date you
13 signed this document?

14 A. Yes.

15 Q. Who is Scott McCollister?

16 A. A lawyer for Fay Sharpe.

17 Q. Was he your attorney?

18 A. Yes, he was.

19 Q. Who was Timothy Nauman?

20 A. An attorney at Fay Sharpe.

21 Q. And working on preparing this patent
22 application, who was the attorney you worked
23 with, attorney or attorneys you worked with?

24 A. Scott McCollister.

25 Q. Is there a reason you went to Fay

1 Sharpe for preparing the patent application
2 when you had the search run by Watts,
3 Hoffmann, Fisher & Heinke?

4 MR. COHN: Let me think about that
5 before I let him answer.

6 MR. WEBER: That's one of my
7 better questions.

8 MR. COHN: Whether it is or isn't,
9 it has nothing to do with whether I should
10 assert the privilege.

11 My problem is, Ray, I don't
12 know how he answers your question without
13 basically disclosing what one or the other
14 lawyers said to him.

15 MR. WEBER: And I don't want you
16 to do that, I will honor that. I disagree on
17 whether or not communications that ultimately
18 go to the Patent Office are privileged but
19 the --

20 MR. COHN: In other words, one
21 firm, one firm tells him something and the
22 other firm tells him something?

23 BY MR. WEBER:

24 Q. Was it a personality thing? Well,
25 let me ask you this, did you pay Watts

1 Hoffmann for the services they had provided
2 you?

3 A. Absolutely.

4 Q. Okay. Did you know Scott McCollister
5 apart from this endeavor?

6 A. No.

7 Q. Okay. How did you get Scott
8 McCollister's name?

9 A. He was an attorney that was friends
10 with one of my wife's fellow partners at the
11 firm that she was at so we got a
12 recommendation from her partner.

13 Q. Fair enough. I apologize, I'm
14 jumping around a little bit here but getting
15 back to the polycarbonate material on the
16 product where you bought the polycarbonate
17 and you split it, did it have a bevelled
18 edge?

19 A. No.

20 Q. Okay. Did the product that you gave
21 to Chemsultants have a textured surface?

22 A. Yes.

23 MR. WEBER: Let's mark this as
24 Exhibit 5.

25 (Defendant's Exhibit

1 No. 5 was marked
2 for identification.)

3 BY MR. WEBER:

4 Q. Do you recognize Exhibit 5?

5 A. Yes.

6 Q. And what is Exhibit 5?

7 A. A patent application.

8 Q. Okay. And this is how it was
9 published, correct? And I'll help you out
10 if you want, you'll see the title right up
11 there, it's a patent application
12 publication.

13 MR. COHN: I just want to point
14 out that exhibit G in the court markings at
15 the top would not have been on the original
16 of this document.

17 MR. WEBER: Fair enough, fair
18 enough, sure.

19 THE WITNESS: Okay.

20 BY MR. WEBER:

21 Q. So do you recognize this as the way
22 your patent application was published?

23 A. Yes.

24 Q. Okay. Now, back on page two, down
25 around paragraph sixteen, you'll see how

1 those have been marked?

2 A. Okay.

3 Q. It says, "Peel adhesion was tested
4 according to a modified PSTC-101D method,"
5 did I read that correctly?

6 A. Yes.

7 Q. Why did you use that testing method?

8 Well, in fact let me step back
9 a little bit, what is this PSTC-101D method?

10 A. It's a method of measuring how good a
11 peel adhesion per square inch your tape has
12 to the floor or to the surface.

13 Q. Okay. Had you ever, well, were you
14 familiar with this test before filing your
15 patent application?

16 A. No.

17 Q. You'd never used it yourself, had
18 you?

19 A. No.

20 Q. Who told you that that's what, that
21 the PSTC-101D method was what you just
22 described to me?

23 MR. COHN: If it was his lawyer,
24 that's a problem question.

25 MR. WEBER: Yeah, if it was your

1 lawyer just say it was my lawyer.

2 MR. COHN: Well...

3 MR. WEBER: Well, you can't do
4 that.

5 MR. COHN: Anyone other than his
6 lawyer.

7 BY MR. WEBER:

8 Q. Yeah, if it was anyone other than
9 your lawyer?

10 A. If it was anyone other than my
11 lawyer, what?

12 Q. Who, who described that test method
13 to you as you just related it to me? And if
14 it was your lawyer, I'll allow you to say I
15 don't know.

16 MR. COHN: Well, may I suggest...

17 MR. WEBER: Go ahead.

18 MR. COHN: Was there someone other
19 than your lawyer who gave you the information
20 about this patent test?

21 BY MR. WEBER:

22 Q. Well, I'll do that, but I think that
23 suggests that it was his lawyer but anyhow,
24 go ahead?

25 A. Okay, we submitted our potentially

1 '480 patent to Chemsultants for a series of
2 tests at the independent lab. Based on what
3 we were doing, they have very good
4 familiarity with floor tapes and adhesives,
5 so I relied on their expertise as far as what
6 is being measured and how.

7 Q. Okay. And so you more than likely
8 got that definition from them, is that fair
9 to say?

10 MR. COHN: Objection.

11 THE WITNESS: Yes.

12 BY MR. WEBER:

13 Q. Okay. When you start here at around
14 paragraph eleven back on the first page, over
15 in the lower right-hand corner, and you go on
16 down through paragraph eighteen, which is the
17 chart, is it fair to say that all of that
18 information, the technical information was
19 provided by Chemsultants?

20 A. No.

21 Q. Okay, what part wasn't?

22 A. The part speaking about how the
23 polyvinyl chloride was used to form a profile
24 and what type of machine was being used and
25 at what temperatures and extrusion rate.

1 Q. Okay. So that's on the manufacturing
2 of the product?

3 A. Correct.

4 Q. Okay. Let's start at paragraph
5 thirteen then, that's fair enough, would
6 paragraphs thirteen through eighteen be the
7 work of Chemsultants?

8 MR. COHN: Let me just object only
9 because that question covers so much, it's
10 difficult.

11 THE WITNESS: Okay, you were
12 saying from?

13 BY MR. WEBER:

14 Q. Thirteen through eighteen.

15 A. Yes.

16 Q. Okay. Now, let's look at your
17 patent again, which was Exhibit 3, and you
18 characterize the invention in column two,
19 down around line 16, you say, "The polymer
20 selected must have Shore A hardness between,
21 for example, 92 and 100, preferably between
22 93 and 97," is that correct?

23 A. That's correct.

24 Q. Okay. And that's how you
25 characterize your invention, it must have

1 that Shore A hardness, correct?

2 A. Yes.

3 Q. And then up above that, go up to the
4 beginning of that paragraph, up around line
5 12 you say, "The layer of polymeric material,
6 one, may be a durable polymer such as
7 polyvinyl chloride, polycarbonate or a
8 terpolymer comprised of acrylonitrile,
9 butadiene and styrene or the like," did I
10 read that correctly?

11 A. Yes.

12 Q. Now, polycarbonate wasn't acceptable
13 I thought?

14 A. Based on our tests, with the
15 polycarbonate we used, it was not.

16 Q. And is terpolymer comprised of
17 acrylonitrile, butadiene and styrene, is
18 that a -- I'm trying to think how we
19 characterized those before -- a thermoplastic
20 elastomer?

21 A. I don't know.

22 Q. Were you hoping that when somebody
23 picked up and read your patent that they
24 might try to use something that you knew
25 wouldn't work well?

1 A. No.

2 Q. Did you ever think to yourself, we
3 ought to remove polycarbonate from this
4 description of preferred embodiments and best
5 modes?

6 A. No.

7 Q. But of course you had sold product
8 with the polycarbonate several years before
9 you filed for this patent application, hadn't
10 you?

11 A. That is accurate.

12 Q. Now, if you go back to the claims
13 here -- I'm sorry, I'm back in Exhibit 5 now,
14 which is your published patent application --
15 and the claims down in paragraph 19 on page
16 two, it says what is claimed, do you see
17 that?

18 A. Yes.

19 Q. Claim one is, "A polymer layer having
20 a Shore A hardness of between about 92 and
21 100," did I read that correctly?

22 A. Yes, you did.

23 Q. That could be polycarbonate, right?

24 A. Yes.

25 Q. And the next one is, "A layer of

1 adhesive attached to said polymer layer," did
2 I read that correctly?

3 A. Yes.

4 Q. That describes the product that you
5 sold several years prior to filing this
6 patent application, doesn't it?

7 A. Yes.

8 Q. Did you --

9 A. Except it doesn't include all the
10 attributes.

11 Q. Okay. You reviewed that application,
12 if I remember correctly, correct?

13 A. That's correct.

14 Q. And you reviewed the claims because,
15 well, let me ask you this, did you understand
16 the importance of patent claims?

17 A. Yes.

18 Q. And you thought this document was
19 extremely important because you sent it to a
20 lot of your competitors, didn't you?

21 MR. COHN: Which document are you
22 holding up?

23 BY MR. WEBER:

24 Q. I'm holding up Exhibit 5, when it
25 published?

1 A. Yes.

2 Q. And yet the product of claim one of
3 that patent application had been on sale well
4 more than a year prior to when you filed for
5 your patent application, right?

6 A. All the parameters that made up the
7 '480 patent were not on sale prior to.

8 Q. I'm only asking you about claim one.
9 In fact let me ask you about claim two, did
10 the product that you sold well more than, the
11 polycarbonate product that you had sold, did
12 it also have a substrate attached to the
13 outer most side of the second layer?

14 A. Where are you reading that from?

15 Q. Well, I'm reading claim two. In
16 fact let me ask you to do this, why don't
17 you read your claims, one through ten, the
18 ones that you asked the government to grant
19 you a patent on so that you could exclude the
20 industry from, and tell me what of those
21 claims don't read on the polycarbonate
22 product that you sold?

23 A. An adhesive tape comprising a polymer
24 layer having a Shore A hardness between about
25 92 and 100. A layer of adhesive attached to

1 the first polymer layer. The adhesive tape
2 of claim one further comprising a substrate
3 attached to outer most side of the said
4 second layer, and then adhesive tape claim --

5 Q. Well, so far do those products have
6 that?

7 A. Yes.

8 Q. Okay.

9 A. An adhesive tape claim of claim one
10 wherein said polymer layer includes a
11 textured surface.

12 Q. Did it have that?

13 A. Yes.

14 MR. COHN: Did what have tha, I'm
15 sorry?

16 MR. WEBER: The polycarbonate,
17 we're talking about the polycarbonate product
18 that you sold well more than a year prior to
19 filing your patent application.

20 MR. COHN: And I thought he was
21 reading the claims that he didn't meet?
22 Maybe I misunderstood the question?

23 BY MR. WEBER:

24 Q. No, it meets all these claims so far,
25 doesn't it?

1 A. Yes.

2 Q. The adhesive tape of claim one
3 wherein said polymer layer is comprised of
4 polyvinyl chloride.

5 Q. It didn't have that then, did it?

6 A. No. The adhesive tape of claim one
7 wherein said polymer includes coloring
8 pigment.

9 Q. Did it have a coloring pigment?

10 A. Yes. Adhesive tape claim of claim
11 four wherein said polyvinyl chloride
12 comprises a clear polymer.

13 Q. So it wouldn't be that, would it,
14 because it wasn't polyvinyl chloride. And
15 number seven?

16 A. The adhesive tape claim of claim one
17 wherein said pressure sensitive adhesive
18 comprises a rubberized double-sided tape.

19 Q. Did it have that?

20 A. Yes. The adhesive tape claim of
21 claim one wherein said first layer thickness
22 of between about .020 and .065, no.

23 Q. So what was the thickness.

24 A. .070 to .085.

25 Q. Nine?

1 A. The adhesive tape of claim one
2 wherein said first layer has a Shore A
3 hardness of between 93 and 97.

4 Q. It had that, right, or it might have
5 been above 97, is that fair to say?

6 A. Might have been above 97.

7 Q. And number ten was the adhesive, a
8 pressure sensitive adhesive?

9 A. Yes.

10 Q. Now, when you put together the
11 history of the development of your product,
12 was that before you went to a patent
13 attorney?

14 A. No.

15 Q. That was to give to your other
16 attorneys when you were ready to sue people,
17 right?

18 A. No.

19 Q. No? When did you prepare that, the
20 chronology that we talked about earlier?

21 A. Oh, when did I prepare the
22 chronology? I thought you were talking about
23 -- I'm sorry. The chronology was prepared
24 after we received the patent.

25 Q. After you received the patent, okay.

1 (Defendant's Exhibit
2 No. 6 was marked
3 for identification.)

4 BY MR. WEBER:

5 Q. Do you recognize Exhibit 6?

6 A. Yes.

7 Q. Okay. Were you kept informed of the
8 prosecution of this patent application?

9 A. Yes, I was.

10 Q. And it spanned what, about eight
11 years or more?

12 A. Yes.

13 Q. And when an office action came in,
14 did you look at it?

15 A. Yes.

16 Q. And did you provide assistance to
17 counsel in responding?

18 MR. COHN: Objection.

19 THE WITNESS: I met with counsel.

20 MR. COHN: That's as far as that
21 answer can go.

22 MR. WEBER: No it's not, I'm not
23 asking for any information you provided
24 counsel. Did you assist counsel in
25 responding to this office action? It's your

1 patent application.

2 MR. COHN: Right, that's
3 privileged communication.

4 MR. WEBER: All right, we'll see.

5 MR. COHN: You can certainly
6 inquire without asking for interchanges
7 between counsel and him.

8 MR. WEBER: Well, I think the
9 attorney here may have -- not necessarily at
10 this time talking about present counsel --
11 have problems in this case.

12 MR. COHN: I don't agree. You can
13 say what you like but I don't agree.

14 BY MR. WEBER:

15 Q. Would you look back on page four of
16 this exhibit, and this exhibit is entitled
17 Amendment A and Response to Office Action,
18 and do you see claim one there, how it's been
19 amended, do you see, do you understand how
20 you amend a claim?

21 A. Well, I see the lining out of the one
22 reference and the two reference and the first
23 reference.

24 Q. Okay. And then there's some
25 underlining stuff, do you see that?

1 A. Yes.

2 Q. And do you understand the
3 significance of striking out and underlining?

4 A. Yes.

5 Q. Okay. And what is that?

6 A. Striking out is removing.

7 Q. Okay. And underlining is what,
8 adding?

9 A. Emphasizing, adding.

10 Q. Well, do you know that to amend a
11 claim you strike out what you want to delete
12 and you underline what you want to add?

13 A. Yes.

14 Q. Okay. And you see this claim, this
15 has one, and then in parenthesis "Currently
16 amended," do you see that?

17 A. Uh-huh.

18 Q. Okay. So that's saying that this
19 claim is being amended and this is how you,
20 as represent by your attorney, wanted this to
21 be amended, is that your understanding?

22 A. That's my understanding.

23 Q. Okay. Now, over on -- well, okay, so
24 claim one was amended to state that the
25 adhesive tape has a polymer layer that has a

1 thickness of between twenty thousandths and
2 sixty-five thousandths of an inch; is that
3 correct?

4 A. That's correct.

5 Q. And then a whole, two whole new
6 claims were added, and that's over on page
7 five. And do you see, I want to look at
8 claim twelve, if you would, and it says, do
9 you see where it says new, in parenthesis
10 right after the twelve?

11 A. Okay.

12 Q. Okay. Do you understand that to mean
13 that this claim is being presented for the
14 first time?

15 And just to help you out, you
16 probably knew this when you were doing it but
17 to help you out, here's your patent
18 application as it was filed or as it was
19 published, and it only went up to claim, if
20 you look at Exhibit 5 --

21 A. Ten.

22 Q. It only went up to ten claims, see,
23 so claims eleven and twelve were added here
24 for the first time, is that fair to say?

25 A. Yes.

1 Q. And claim twelve was amended to
2 include, down in the second sub-paragraph, a
3 double-sided adhesive layer, do you see
4 that?

5 A. Which claim?

6 Q. Claim twelve recites a double-sided
7 adhesive layer?

8 A. Yes.

9 Q. By the way, on the polycarbonate
10 product that you sold, did that have carpet
11 tape on it, on the back?

12 A. Yes.

13 Q. Okay. And that carpet tape had a
14 peel adhesion that was greater than two
15 pounds per inch width, didn't it?

16 A. I don't know.

17 Q. Have you ever tried to pull up a
18 carpet that's laid down with carpet tape?

19 A. Yes.

20 Q. What, what would be your
21 understanding from that effort, is it greater
22 than two pounds per inch width?

23 A. I don't know.

24 Q. Okay. What is an adhesive tape?

25 MR. COHN: Are you asking in this

1 particular context?

2 BY MR. WEBER:

3 Q. Yeah, the context of this patent and
4 the office action. In fact here, I'll help
5 you out, thank you, counselor. Turn to page
6 nine, are you at page nine?

7 A. Uh-huh.

8 Q. Do you see the second sentence on
9 that page, "Even if the multilayered sign
10 blank in Condon," that's referring to a prior
11 art patent, "does contain a layer of adhesive
12 that permits the multilayered sign blank to
13 be adhered to a substrate, the mere presence
14 of that adhesive does not transform the
15 multilayered sign blank into an adhesive
16 tape." What's an adhesive tape?

17 A. I would imagine there are many
18 definitions for what an adhesive tape is.

19 Q. Well, what's the definition that you
20 were hoping to convey to people skilled in
21 the art when you submitted your patent
22 application?

23 A. The '480 patent?

24 Q. Yes.

25 A. Yes, that's the answer.

1 Q. Everything that's in it, that's an
2 adhesive tape, you don't have a more general
3 definition, is that fair to say?

4 A. I could provide you one.

5 Q. Well, provide me with one.

6 A. A strand of material that has sticky
7 material on it.

8 Q. Okay, that's the sum and substance of
9 it?

10 A. Of that definition.

11 Q. Well, is that your definition, is
12 that a definition that when you used the term
13 or when your counsel used that term in
14 responding to the Patent Office that you
15 wanted to convey?

16 A. Well, I guess I'm confused. You're
17 talking about Condon here and then you're
18 talking about my counsel, with what my
19 counsel wanted to convey with this tape.

20 Q. Did you review these responses from
21 the Patent Office actions?

22 A. Yes.

23 Q. Okay. So you didn't have any trouble
24 with, I mean did you have any problems with
25 anything that was filed with the Patent

1 Office? Did you ever say, gee, that's not
2 right, I wouldn't have said it that way?

3 MR. COHN: Did he ever say that to
4 who?

5 MR. WEBER: Yourself.

6 THE WITNESS: Of course.

7 BY MR. WEBER:

8 Q. You did? Did you say it about this
9 sentence I just read?

10 A. No.

11 Q. Okay. Well, I mean you're just
12 saying something does not transform a
13 multilayered sign blank into an adhesive
14 tape.

15 Now is it fair to say that the
16 author of this paper, or your agent who
17 submitted this, believed that the patent
18 examiner, as a person skilled in the art,
19 would understand what an adhesive tape is,
20 and if so what is an adhesive tape?

21 MR. COHN: Objection, this is
22 beyond factual inquiry.

23 THE WITNESS: I relied on counsel
24 to respond to the office action as far as on
25 this and I was very satisfied with this, his

1 responses.

2 BY MR. WEBER:

3 Q. Okay, that's your answer to my
4 question? I mean if it is, it is. Is it?

5 A. What was your question?

6 Q. What is an adhesive tape, in the
7 context of what you were trying to relate to
8 the examiner in responding to this office
9 action?

10 MR. COHN: Can I hear his answer
11 back please.

12 (Previous testimony read back as requested.)

13 BY MR. WEBER:

14 Q. If you were asked about it, what did
15 you understand adhesive tape to be when you
16 read it?

17 MR. COHN: Objection.

18 BY MR. WEBER:

19 Q. And if it's the definition you gave
20 just awhile ago, if it is I'm fine to move
21 on, I just want to give you every opportunity
22 to perfect the record.

23 MR. COHN: Objection, move to
24 strike, you don't have to make little
25 speeches what your question is designed to

1 do.

2 BY MR. WEBER:

3 Q. Go ahead.

4 A. A tape is something that has an
5 adhesive on it that will adhere to a surface.

6 Q. Now, if you'll turn to page ten, I
7 want you to look at the first full paragraph
8 there and go down about four lines, it starts
9 however, and it says, "However, Condon
10 discloses a polymer layer that has a
11 specified Shore D hardness or Shore C
12 hardness and does not disclose any Shore A
13 hardness values of the polymer layer," did I
14 read that correctly?

15 A. Yes.

16 Q. Is it, is it your understanding that
17 it's impossible to correlate Shore A to Shore
18 D to Shore C?

19 A. It's my understanding that there are
20 some difficulties correlating between them,
21 the different scales.

22 Q. Well, is there anything unique about
23 a Shore A hardness as compared to Shore B or
24 Shore C?

25 A. Different methods of testing the

1 hardness, used with different tools.

2 Q. But assuming that you've got a piece
3 of material and you want to test its
4 hardness, you can test its hardness, its
5 Shore A hardness and get a value, a Shore B
6 hardness and get a value and a Shore C
7 hardness and get a value, and those three
8 values will correlate with each other, won't
9 they?

10 MR. COHN: Objection.

11 THE WITNESS: No, not that I know
12 of, there is no perfect correlation between
13 those three different scales.

14 BY MR. WEBER:

15 Q. Okay. Well, if I had a scale and I
16 was measuring something, let's say this
17 scale was a linear scale and I was only
18 going to measure length. And I measure this
19 thing and the first scale was just in inches
20 and I measured it, I'd get eighteen inches
21 let's say, the thing is eighteen inches
22 long.

23 But then I go pick up something
24 that's measures only in feet and I measure
25 it and, wow, it's only one and a half feet

1 long. And then I get a yardstick that's only
2 measured in yards and I measure it and say
3 this is only a half yard long.

4 The length of that product
5 didn't change at all, did it?

6 A. No, it didn't.

7 Q. It was just the scale that I chose to
8 use; is that correct?

9 A. That's correct.

10 Q. So when you read this response to
11 the patent application saying, well, Condon
12 can't be a good reference because it only
13 talks about Shore D and Shore C hardness and
14 we're talking about Shore A hardness, didn't
15 you think, wow, there must be some
16 correlation between Shore A, Shore D and
17 Shore C?

18 MR. COHN: Objection.

19 MR. WEBER: Didn't you?

20 MR. COHN: Objection.

21 THE WITNESS: No.

22 BY MR. WEBER:

23 Q. Was this the first experience you
24 ever had with testing the hardness, the
25 surface hardness of a material?

1 A. No.

2 Q. Okay, when had you done that
3 previously?

4 A. I don't remember just where it was at
5 but I know I've had different measures of
6 hardness, Shore A hardness or whatever.

7 Q. Well, if you look at claim twelve
8 again, and it's back on page five, that's the
9 knew claim and it talks about a double-sided
10 adhesive layer and substantially continuous
11 contact with the first side of the polymer
12 layer, do you see all that?

13 A. Where are you at?

14 Q. I'm sorry, claim twelve, the new
15 claims, you get down there and it talk about
16 a double-sided adhesive layer, substantially
17 continuous contact with the first side of the
18 polymer layer, do you see that?

19 A. Uh-huh.

20 Q. Okay. None of that was in the claims
21 as they were originally filed, was it?

22 A. No.

23 Q. And yet if you look at the comment
24 that you through your attorney made to the
25 Patent Office on page sixteen, it's talking

1 about the new claims, it says, the second
2 sentence, "Applicant believes these new
3 claims will not require an additional search
4 because, even though they have been broadened
5 in certain respects, these new claims recite
6 elements largely contained in the present
7 claims covered by the Examiner's previous
8 search," do you see that?

9 A. Yes.

10 Q. Well, the previous search was on the
11 application as filed, you know that,
12 correct?

13 A. Yes.

14 Q. Okay. And the claims as originally
15 filed didn't have any of that stuff about
16 the double-sided adhesive and the
17 substantially continuous contact in them,
18 did they?

19 MR. COHN: Let me object to the
20 impropriety of your requiring the witness to
21 impart legal argument by his counsel.

22 MR. WEBER: This isn't legal
23 argument, these are factual presentations
24 and, by the way, misrepresentations to the
25 Patent Office is what they are.

1 MR. COHN: No, they're not.

2 MR. WEBER: Well, they are.

3 MR. COHN: They're not.

4 MR. WEBER: But in any event --

5 MR. COHN: We'll see in the end
6 who's right about that, won't we?

7 MR. WEBER: I think we will.

8 THE WITNESS: Claim seven on the
9 original patent does indeed speak of an
10 adhesive tape, claim one, where it says
11 pressure sensitivity shall comprise of the
12 rubberized double-sided tape.

13 BY MR. WEBER:

14 Q. It's rubberized, right, it's not as
15 broad as to say that it's just a double-sided
16 tape and it doesn't say that it's, and that
17 claim doesn't have all the other limitations
18 that are in claim twelve, does it?

19 MR. COHN: Do you want to just
20 debate the client?

21 MR. WEBER: Well, no, if he
22 wants --

23 MR. COHN: That's what you're
24 doing.

25 MR. WEBER: No, if he wants to

1 offer that, I want to come back and ask him
2 if he can show me.

3 MR. COHN: You're asking a
4 compound question, which is an effort to
5 enter into a debate, and it's inappropriate,
6 you should know better.

7 MR. WEBER: Well, I've been in
8 practice for awhile so I appreciate the
9 opportunity to learn.

10 MR. COHN: That's why you should
11 know better.

12 MR. WEBER: I greatly appreciate
13 it.

14 MR. COHN: There are two kinds of
15 lawyers and I'm finding out which kind you
16 are.

17 MR. WEBER: Well, I think you guys
18 should have looked at this a little better.
19 I apologize, I'm not going to throw stones at
20 you and I'll ask you not to do it to me.

21 MR. COHN: Well, don't force me.

22 BY MR. WEBER:

23 Q. All right. Well, in one of the
24 lawsuits you're involved in there's been some
25 detailed charges of fraud on the Patent

1 Office, haven't there been?

2 MR. COHN: Objection, what do you
3 mean by detailed?

4 THE WITNESS: Yeah.

5 MR. WEBER: And what case was
6 that?

7 THE WITNESS: Creative Safety.

8 MR. WEBER: Let's do this one.

9 (Defendant's Exhibit
10 No. 7 was marked
11 for identification.)

12 BY MR. WEBER:

13 Q. Do you recognize Exhibit 7?

14 A. Yes.

15 Q. And you recognize that as another
16 response to a Patent Office action?

17 A. Yes.

18 Q. And do you see, now let's look at
19 claim one here where you amended your claim
20 to include "substantially uniform" in
21 describing the thickness of the polymer
22 layer, do you see that?

23 A. Uh-huh.

24 Q. The drawing in your patent, which I'm
25 looking at the patent itself, Exhibit 3, do

1 you see the polymer layer there as being
2 element one?

3 And I switched, I apologize,
4 I'm sorry, it's Exhibit 3, the patent
5 itself.

6 A. Okay.

7 Q. If you go to the second page that has
8 the drawing, although it's on the first page,
9 too, do you see number one, which is the
10 polymer layer?

11 A. Yes.

12 Q. Okay. Now, is it fair to say that
13 that polymer layer has a totally uniform
14 thickness?

15 A. As represented.

16 Q. Okay. Was there anywhere in the
17 patent where it was ever represented as being
18 anything other than as shown in that drawing
19 and that is, you know, the totally uniform
20 thickness?

21 A. I don't believe so, no.

22 MR. COHN: Are we talking about a
23 drawing?

24 MR. WEBER: Well, a drawing or
25 anywhere in the patent. That's how you

1 understood my question, right?

2 THE WITNESS: Yes.

3 MR. WEBER: Okay. Why don't we
4 mark this one.

5 (Defendant's Exhibit
6 No. 8 was marked
7 for identification.)

8 BY MR. WEBER:

9 Q. Now, do you recognize Exhibit 8?

10 A. Yes.

11 Q. That was this Maurer patent was cited
12 against your patent application, right?

13 A. That's correct.

14 Q. Do you know Mr. Maurer?

15 A. No.

16 Q. Or either of the Messrs. Maurer, it
17 looks like there's two of them, Alex and
18 Richard, you don't know either of the
19 Maurers?

20 A. No.

21 Q. Okay. And here it was talking about
22 steps that the tape forms as it's wrapped
23 around the end of a hockey stick, right?

24 MR. COHN: Is there a specific
25 place you're referring to?

1 MR. WEBER: I'm referring to the
2 patent as a whole, maybe even the title,
3 Applique for a Hockey Stick.

4 MR. COHN: You're referring to the
5 claim page on the patent?

6 BY MR. WEBER:

7 Q. No, if you would listen to the
8 question, I'm asking isn't that what this is
9 about, this is about like the title says,
10 which the law requires that the title be
11 somewhat descriptive, it's an applique for a
12 hockey stick, and it's how the head of the
13 hockey stick can be wrapped where it makes
14 engagement with the puck, am I correct in
15 that regard, as you recall it?

16 A. Yes.

17 Q. Okay. And if you look down at the
18 bottom of column twelve, line 66, the
19 Examiner was pointing to this and Maurer
20 says, "Most preferably, the first step 108
21 has a thickness of about .008 of an inch,"
22 right?

23 A. Where are you at?

24 Q. Okay, I'm in column twelve, and go
25 all the way down to the bottom in column

1 twelve, around line 66 it says, "Most
2 preferably, the first step 108 has a
3 thickness of about .008 inches," correct?

4 A. Okay.

5 Q. And then the second step .028, third
6 step .048, do you see that?

7 A. Yes.

8 Q. Okay. And to get around Maurer, the
9 claim, claim one was amended to include the
10 "substantially uniform thickness" language,
11 right, saying we don't have steps, do you
12 recall that?

13 MR. COHN: Objection.

14 THE WITNESS: I recall us
15 ascertaining that our product does not have
16 steps.

17 BY MR. WEBER:

18 Q. While Maurer does, correct?

19 A. We just read it.

20 Q. Okay.

21 A. Yeah.

22 (Defendant's Exhibit
23 No. 9 was marked
24 for identification.)

25 BY MR. WEBER:

1 Q. Do you recognize Exhibit 9?

2 A. Yes.

3 Q. The response here adds a couple of
4 new claims, and if you look back on page
5 three, you see claims thirteen and fourteen;
6 is that correct?

7 A. Yes.

8 Q. And claim fourteen talks about the
9 two pounds per inch width when peeled at a
10 ninety degree angle under a modified PSTC-101
11 method, do you see that?

12 A. Yes.

13 Q. Okay. Now, we talked earlier about a
14 PSTC-101D test procedure, do you recall that
15 discussion?

16 A. Yes.

17 Q. And is that what's been being
18 referred to here in this claim?

19 MR. COHN: Objection.

20 BY MR. WEBER:

21 Q. Or is it something new, was the D
22 left off inadvertently?

23 A. I don't know.

24 Q. Okay. You understand that anything
25 presented in a claim has to be supported in

1 the patent specification or drawings, right?

2 A. Yes.

3 Q. Okay. Is there anywhere in the
4 patent specification that you can recall --
5 and I'll stipulate that the document will
6 speak for itself -- but as you sit here today
7 can you recall any reference in this patent
8 specification to a PSTC-101 method as
9 compared to a 101D method?

10 MR. COHN: You should be looking
11 at the patent if you're looking for something
12 to try to answer his question.

13 MR. WEBER: I'm just asking if you
14 can recall, because I'll stipulate the patent
15 will speak for itself, but if you can recall
16 something then we can move it along.

17 MR. COHN: Well, he can look at it
18 to give his answer, that's appropriate.

19 MR. WEBER: Yeah, he can do that,
20 I'm just asking for his recollection.

21 THE WITNESS: I'm sorry, where in
22 the patent are you talking about?

23 BY MR. WEBER:

24 Q. Well, I saw 101D mentioned at column
25 three, down around line thirteen and

1 fourteen, and I was wondering if there is a
2 101 mentioned anywhere in there?

3 A. Okay. I do have, if memory serves me
4 correct, there was some measurement done by
5 Chemsultants that they listed the wrong peel
6 adhesion method, that it was more, if I'm
7 thinking about the same thing.

8 Q. When did you come to that
9 realization?

10 A. After one of the filings with
11 Creative Safety and in conversations with my
12 lawyer.

13 Q. Oh, okay, after the patent had issued
14 and after this lawsuit was filed?

15 A. Yes.

16 Q. Now, did you understand from this
17 office action that the Patent Office was, had
18 been challenging you as the patent applicant
19 with regard to how you could support your
20 claim for "substantially uniform polymer
21 layer," and I'm looking at the way you
22 address it at page six?

23 MR. COHN: What office action are
24 you referring to?

25 MR. WEBER: The office action that

1 Exhibit 9 is responding to.

2 MR. COHN: Do we have that so he
3 can see it?

4 MR. WEBER: I'm asking if he
5 recalls such an office action, where the
6 Examiner challenged whether or not there was
7 any support for you claiming a "substantially
8 uniform thickness" of the polymer layer, do
9 you remember that being an issue during the
10 prosecution of the patent?

11 A. I don't remember.

12 Q. Okay. If you look over at the top
13 of page seven of this response to the office
14 action, at the very top starting with the
15 first full sentence, "The substantially
16 uniform thickness of the polymer layer may
17 be defined by claim one itself, in that the
18 claim calls for, among others, a
19 'substantially uniform thickness of between
20 about .020 and .065'" of an inch, did I read
21 that correctly?

22 A. That's correct.

23 Q. And then you said, you through your
24 agent went on and said, "In other words,
25 this portion of the claim is self defining.

1 Substantially uniform means between about
2 the forty-five thousandths of an inch range
3 claimed," do you see that.

4 A. Yes.

5 Q. So were you saying to the Patent
6 Office that any variation between twenty
7 thousandths and sixty-five thousandths of an
8 inch would still be substantially uniform?

9 A. No.

10 Q. Okay. Can you explain to me what you
11 were trying to convey to the Patent Office,
12 maybe in words other than those that I just
13 read?

14 A. That --

15 MR. COHN: Objection, you keep
16 going from you to your attorney and back and
17 forth, you're making it very confusing for
18 the witness by doing that.

19 BY MR. WEBER:

20 Q. Well, your attorney is only an agent
21 for you in practicing before the Patent
22 Office and in fact doesn't even have to be an
23 attorney, it can be a patent agent, do you
24 understand that?

25 A. Yes.

1 Q. Okay. And you looked at these
2 things, these proposed responses before they
3 were filed, didn't you?

4 A. Yes.

5 Q. Okay. And you approved them before
6 they were filed, didn't you?

7 A. Yes.

8 Q. And in fact they were filed on your
9 behalf, because you were the one that was
10 going to get the patent, right?

11 A. Yes.

12 Q. Okay. So now let's talk about this
13 stuff, what is this, what am I missing here,
14 how much of a variation could you have and
15 still be substantially uniform?

16 A. I think what you're doing is you're
17 saying that the one product has to be twenty
18 thousandths to twenty-two, where this is
19 saying that the thickness could be twenty
20 thousandths, it could be twenty-four
21 thousandths, it could be thirty-five
22 thousandths, it could be fifty-five
23 thousandths and still be covered. And each
24 one of those products would be substantially
25 uniform in that range.

1 Q. Well, how much variation could, let's
2 say that it was a twenty-four thousandths
3 inch thick layer of polymer, could it have a
4 variation of a thousandth and still be
5 substantially uniform thickness?

6 In other words, go from
7 twenty-three thousandths to twenty-five
8 thousandths and still be substantially
9 uniform?

10 MR. COHN: Objection.

11 THE WITNESS: That's a matter of
12 interpretation.

13 BY MR. WEBER:

14 Q. Well, okay, but these are your claims
15 and these are your arguments to the Patent
16 Office and "substantially uniform" when you
17 were arguing with the Patent Examiner or
18 responding to the Patent Examiner, you said
19 "substantially uniform" means between about
20 the forty-five thousandths of an inch range
21 claim, and so what I take that as, I have
22 forty-five thousandths of an inch?

23 MR. COHN: Objection, that's not
24 what he said.

25 BY MR. WEBER:

1 Q. "Substantially uniform," I'm going to
2 quote it, "In other words, this portion of
3 the claim is self defining," dash,
4 "substantially uniform means between about
5 the forty-five thousandths of an inch range
6 claimed."

7 So anything that falls within
8 the forty-five, as long as it stays within
9 that forty-five thousandths of an inch range,
10 is it substantially uniform thickness?

11 A. My interpretation of that is that if
12 the product is twenty-two thousandths thick,
13 it's inside the patent range. If you make
14 another product and it's thirty-five
15 thousandths thick, it's within the patent
16 range. If we make it sixty-six thousandths
17 wide, it is outside of the patent range.

18 Q. Okay, that's the range. What is
19 "substantially uniform," what did you want
20 the Examiner to believe "substantially
21 uniform" meant?

22 MR. COHN: Again, objection.

23 THE WITNESS: That from one -- the
24 overall thickness of the tape from one edge
25 of the tape to the other, for the majority of

1 the profile itself, is in and around the same
2 thickness.

3 BY MR. WEBER:

4 Q. You never said that in your patent
5 application though, did you?

6 MR. COHN: He never said anything
7 in his patent application.

8 MR. WEBER: That's true. Do you
9 adopt your attorney's answer?

10 MR. COHN: The attorney said it.

11 THE WITNESS: I didn't.

12 BY MR. WEBER:

13 Q. Your attorney did?

14 A. Yes.

15 Q. Are you laying these responses to the
16 office action on your attorney and you don't
17 have any responsibility for them?

18 A. No, not at all.

19 Q. By the way, when did you retain Mr.
20 Harders?

21 A. 2005 sometime, July of 2005.

22 Q. And how did that come about? And I
23 don't want to hear any attorney/client
24 privilege stuff, but why did Mr. Harders
25 take over for Mr. Nauman and Mr. McCollister?

1 MR. COHN: Objection, let me think
2 about that for a minute.

3 I think that's going to be
4 difficult to answer. I don't know what the
5 answer is so I don't know if it can be
6 answered without disclosing privilege or not.
7 Can I confer with the client and I'll give
8 you a decision on it?

9 MR. WEBER: Sure.

10 (Discussion had off the record.)

11 MR. COHN: You can answer.

12 BY MR. WEBER:

13 Q. Go ahead.

14 A. We were concerned with obtaining
15 adequate response times in working with our
16 attorney, with the Fay Sharpe attorney.

17 Q. Okay, responsiveness of the attorney?

18 A. Responsiveness of the attorney.

19 MR. WEBER: Okay, fair enough.

20 Next number.

21 (Defendant's Exhibit
22 No. 10 was marked
23 for identification.)

24 BY MR. WEBER:

25 Q. Do you recognize Exhibit 10?

1 A. Yes.

2 Q. Okay. And this is another response
3 to a Patent Office action?

4 A. Yes, it is.

5 Q. And here it was added to claim one --
6 I'm over on page number two -- the adhesive
7 tape comprises a peel adhesion greater than
8 two pounds per inch width, et cetera, under a
9 modified PSTC-101 method, correct?

10 A. Correct.

11 Q. And claim twelve, it was added that
12 the peel adhesion was measured under a test
13 method including peeling the tape at a ninety
14 degree angle after application to a stainless
15 steel panel, correct?

16 A. Correct. Where are you getting that
17 ninety degree angle?

18 Q. I'm over on claim twelve, which is
19 page three, I'm sorry.

20 A. Okay, okay.

21 Q. See, it's the underlined portion.

22 A. Oh, okay, okay.

23 Q. And then you added a couple new
24 claims, claim fifteen, which is over on page
25 four, it says the test method further

1 includes peeling the tape at a ninety degree
2 angle after application to a stainless steel
3 panel and allowing a dwell of one hour,
4 correct?

5 A. Correct.

6 Q. Now, the PSTC-101 method for example
7 that was added to claim one is not described,
8 at least by that name and to your
9 recollection, in the patent specification,
10 correct?

11 A. Is that the one that was PSTC-101D?

12 Q. Yes.

13 MR. COHN: Are you asking him to
14 repeat his earlier testimony?

15 MR. WEBER: I want this to be
16 cohesive here, and I'm sure that he can
17 repeat his earlier testimony without much
18 trouble at all.

19 MR. COHN: Well, I think it should
20 be adhesive, not cohesive.

21 MR. WEBER: Did I say cohesive?
22 All right, adhesive, the adhesive.

23 MR. COHN: You said cohesive
24 correctly.

25 MR. WEBER: Oh, okay, all right.

1 It's getting late, but that was good.

2 THE WITNESS: Okay, and what was
3 your question again, one more time?

4 MR. WEBER: Can you read that
5 back.

6 (Previous testimony read back as requested.)

7 THE WITNESS: In the patent
8 application it's described as PTSC-101D.

9 MR. WEBER: Okay. And then I'll
10 ask the reporter to mark this exhibit as
11 Exhibit 11.

12 (Defendant's Exhibit
13 No. 11 was marked
14 for identification.)

15 BY MR. WEBER:

16 Q. And do you recognize Exhibit 11?

17 A. Yes.

18 Q. And do you recognize this as a notice
19 of allowance of your patent application?

20 A. Yes.

21 Q. And back on numbered page two, which
22 is, well, let's get back, it's actually one,
23 two, three, four, the sixth page back in the
24 exhibit, where there's a heading "Reasons for
25 Allowance," do you recall receiving this in a

1 statement for reasons for allowance from the
2 Examiner?

3 A. Yes.

4 Q. And have you looked at that
5 paragraph?

6 A. Which paragraph?

7 Q. The paragraph that's the stated
8 reasons for allowance.

9 MR. COHN: You mean all the
10 paragraphs in that section?

11 MR. WEBER: No, there's just one
12 paragraph that states the reasons for
13 allowance, "The closest prior art of record
14 fails to teach or suggest," do you see that?

15 THE WITNESS: Yes.

16 MR. WEBER: Okay.

17 MR. COHN: I think your
18 description, I know what you're talking about
19 but I don't think you described it
20 accurately. The whole page is headed
21 "Reasons for Allowance," not just a single
22 paragraph.

23 MR. WEBER: Yeah, but the actual,
24 the reasons for allowance is that paragraph.
25 The next is if you've got any comments, call

1 me. If you have any inquiry, this is how you
2 reach me, if you try to reach me and you're
3 unsuccessful, try somebody else.

4 MR. COHN: So you're just
5 characterizing that one paragraph as being
6 the one related to the heading?

7 MR. WEBER: I'm telling you that
8 that's the one that states the reasons for
9 allowance. None of the rest on that page or
10 the following page is any reason for allowing
11 the patent.

12 THE WITNESS: Okay.

13 BY MR. WEBER:

14 Q. Do you agree with the statements of
15 the Examiner?

16 A. Yes.

17 MR. WEBER: Okay.

18 (Defendant's Exhibit
19 No. 12 was marked
20 for identification.)

21 BY MR. WEBER:

22 Q. I'll hand you what's been marked as
23 Exhibit 12 and ask if you're familiar with
24 this document?

25 A. Yes, I am familiar with it.

1 Q. And do you know why this was filed?

2 A. Procedural I would imagine, with
3 notice of allowance.

4 Q. If you read the comments over on page
5 two, and while there's two paragraphs under
6 comments, the only one that's relevant is the
7 first one I think.

8 A. Okay, what's your question?

9 Q. Have you read that?

10 A. Yes.

11 Q. Okay. Do you understand that to be
12 saying that the Examiner shouldn't have
13 allowed some of these claims because the
14 elements that the Examiner recited as being
15 the reason for allowance are not present in
16 some of the allowed claims?

17 A. No, that's not my understanding of
18 it.

19 Q. Do you read it as saying that the
20 elements that are not present in each of the
21 allowed claims that the Examiner has cited as
22 a basis for allowance are inferentially
23 included in the claims?

24 MR. COHN: Objection.

25 THE WITNESS: I understand it

1 that the Examiner is saying that the claims
2 are allowed, that's my understanding of it.

3 BY MR. WEBER:

4 Q. Okay, do you understand what you
5 through your attorney are saying, when you
6 were invited to comment upon what the
7 Examiner did and you provided this comment,
8 do you have any understanding beyond what
9 you've just stated?

10 A. I don't know. I have to confess I
11 thought it was just more procedural.

12 MR. WEBER: That's fine. All
13 right, let's take a break.

14 - - -

15 (Short recess had.)

16 - - -

17 (Defendant's Exhibit
18 No. 13 was marked
19 for identification.)

20 BY MR. WEBER:

21 Q. I've handed you what's been marked
22 as Exhibit 13, and I don't know that you've
23 ever seen this before, but this is PSTC-101
24 and the different test methods of that.

25 And if you look down on the

1 first page you'll see under scope, and you
2 go down to 1.1.4, do you see that?

3 A. Yes.

4 Q. And it has test method D, this is
5 under PSTC-101, it says, "Test method D
6 gives a measure of adherence of the release
7 liner to the adhesive of either single or
8 double-coat tape," did I read that
9 correctly?

10 A. Yes.

11 Q. Okay. So what do you understand
12 PSTC-101D to be directed to?

13 MR. COHN: Objection.

14 THE WITNESS: That measures the
15 adhesion to the tape to the throw-away
16 release liner.

17 BY MR. WEBER:

18 Q. Okay. And then if you go back on
19 page 101-6, up at the top, thirteen, it
20 identifies the test method D and it has, it
21 identifies it as "Adhesion to liner of
22 double-coated and single-coated tapes,"
23 right?

24 A. That's what it reads, yes.

25 Q. Now, the reference to 101D in the

1 patent is erroneous, isn't it?

2 MR. COHN: Objection.

3 THE WITNESS: Not that I know of.

4 BY MR. WEBER:

5 Q. So you think that it was intended to
6 be, that the reference to 101D was purposeful
7 and accurate in the patent?

8 MR. COHN: Objection. I'm going
9 to call your attention to the part of the
10 patent that you're referring to.

11 THE WITNESS: Okay. And what was
12 the question, what was your question?

13 MR. WEBER: Would you read it
14 back.

15 (Previous testimony read back as requested.)

16 THE WITNESS: The 101D reference
17 originated from the Chemsultants report on
18 the adhesion capability of the tape
19 measurements. I believe there was an
20 inaccuracy when they reported that, that they
21 did not mean to do the D.

22 BY MR. WEBER:

23 Q. Okay, inaccurate, did you have the
24 problem with my saying it was erroneous?

25 A. Yes.

1 Q. And what's the difference between
2 inaccurate and erroneous?

3 A. Because you're giving my patent a
4 connotation that it's an erroneous patent.

5 Q. No, I was only directing it to that
6 element. But is it fair to say that
7 somewhere along the line during the
8 prosecution of this patent that the error
9 was caught, because further reference to
10 PSTC-101 was just presented as that, without
11 the D?

12 A. That is something that you would
13 need to consult my attorney on, in reference
14 to the inaccuracy.

15 Q. The adherence of the release liner
16 to the adhesive was not a feature or a
17 particular concern in your patent, was it?

18 A. No.

19 (Defendant's Exhibit
20 No. 14 was marked
21 for identification.)

22 BY MR. WEBER:

23 Q. Do you recognize Exhibit 14?

24 A. Yes.

25 Q. And what is Exhibit 14?

1 A. The Condon patent.

2 Q. And that's the Condon patent we
3 mentioned sometime back; is that correct?

4 A. Yes.

5 MR. WEBER: Okay.

6 (Defendant's Exhibit
7 Nos. 15 and 16 marked
8 for identification.)

9 BY MR. WEBER:

10 Q. Now, if you want we can either refer
11 to Exhibits 15 and 16 or we can actually go
12 to your published patent application, which
13 is Exhibit 5, and look at its claims, and
14 your patent, which is Exhibit 3, and look at
15 its claims.

16 I would represent to you that
17 I have or my secretary has accurately
18 re-typed the claims in Exhibits 15 and 16,
19 but you can do whichever makes you feel most
20 comfortable.

21 MR. COHN: I'm more comfortable
22 with using the real thing.

23 MR. WEBER: The real patent, all
24 right. Well, then you can do that and the
25 witness can do whatever he feels.

1 MR. COHN: No, I think the witness
2 should do what his counsel is most
3 comfortable with.

4 MR. WEBER: All right, then let's
5 look at the claims.

6 MR. COHN: 5 and 3 you say?

7 BY MR. WEBER:

8 Q. Let's look first at Exhibit 5, which
9 was your patent application as filed, or as
10 published, which was also the claims as
11 filed. And do you see those back on page
12 two, over on the right-hand, lower right-hand
13 corner of Exhibit 5?

14 A. Page?

15 Q. The page numbered two up at the top.

16 A. Oh, okay.

17 MR. COHN: You have Exhibit No. 3
18 out, because you're going to need it in a
19 second.

20 BY MR. WEBER:

21 Q. Now, I walked you through, I walked
22 you through the four amendments that took
23 place in the prosecution of your patent here
24 earlier, do you recall that?

25 A. Yes.

1 Q. Okay. And is it -- and do you
2 recognize the lower right-hand corner of
3 numbered page two of your published patent
4 application, which is Exhibit 5?

5 A. Okay.

6 Q. Do you recognize those as being the
7 claims that published in your, when your
8 patent application was published?

9 A. Yes.

10 Q. Okay. And do you recognize the
11 claims that bridge columns four and five of
12 your patent, which is Exhibit 3, as being
13 your patent claims?

14 A. Yes.

15 Q. Okay. And would you agree -- well,
16 strike that.

17 Is any of the patent claims
18 substantially identical to the invention as
19 claimed in the published patent application?

20 MR. COHN: Objection.

21 THE WITNESS: I rely on counsel to
22 respond to patent rejections and to modify
23 the, the appeals. And I rely on his counsel
24 and I'm happy with what he has done for me in
25 that regard.

1 BY MR. WEBER:

2 Q. Okay. And do you, do you recall the
3 evolution of the application claims or the
4 publication claims of Exhibit 5 through four
5 sets of amendments to get to the patent
6 claims of Exhibit 3?

7 A. Yes.

8 Q. So you don't have personally an
9 appreciation of whether any of the
10 application claims is substantially identical
11 to any of the patent claims; is that
12 correct?

13 A. That's incorrect.

14 Q. Okay.

15 A. What I said was I rely on counsel to
16 submit appeals to rejections on the patent
17 applications and follow the process through.
18 He consulted with me and I approved his
19 modifications.

20 Q. All right, okay. But my question
21 here this afternoon is, is any claim of the
22 published patent application substantially
23 identical to any of the allowed claims?

24 MR. COHN: Do you want him to read
25 it to determine it now or do you want to know

1 if he already knows that?

2 MR. WEBER: Well, I want to know
3 if you already know whether or not there's
4 any claim in either the patent or the
5 published application that is substantially
6 identical to a claim in the application or
7 patent?

8 MR. COHN: He's not asking you to
9 determine that now, he's asking whether you
10 know that.

11 MR. WEBER: Thanks for trying to
12 help.

13 MR. COHN: He's not asking you to
14 read it now and make that determination, he's
15 asking if in your head, if you know whether
16 any of the claims in the two documents are
17 substantially identical. Do you know?

18 THE WITNESS: I don't know.

19 MR. WEBER: Okay. See how easy
20 that was.

21 MR. COHN: Just listen to the
22 question.

23 (Defendant's Exhibit
24 No. 17 was marked
25 for identification.)

1 BY MR. WEBER:

2 Q. Okay. You've seen Exhibit 17 before,
3 haven't you?

4 A. I don't know if I've seen the exhibit
5 before; I have seen the representation of
6 what is presented here.

7 Q. Okay. What do you understand Exhibit
8 17 to be showing?

9 A. I understand it to be showing Cliff's
10 representation of his floor tape with the
11 undercut.

12 Q. Okay. The polymer layer?

13 A. Well, I see no reference to something
14 saying there's a polymer layer here. But if
15 you're talking this, I read this as being the
16 floor tape.

17 Q. Okay. And if you read this, in fact
18 why don't you circle with this red pen what
19 you just said you understood to be the floor
20 tape.

21 A. (Doing as requested.)

22 Q. Okay. And if you look at that, where
23 would the adhesive be?

24 A. Right in the undercut to the other
25 side, where it goes into the undercut.

1 Q. Okay. And on each side of the
2 undercut is there a step in the, in the
3 polymer layer?

4 A. There is represented to be a step.

5 Q. Okay. And it goes from one surface,
6 it steps down and goes to another surface; is
7 that correct?

8 A. Yes.

9 Q. And between those two steps, do you
10 understand there to be adhesive?

11 A. Yes.

12 Q. And what do you understand the
13 purpose of those steps to be?

14 A. To be a channel to where adhesive is
15 applied.

16 Q. Okay. Do you understand the steps to
17 serve to contain the adhesive?

18 A. I don't know that.

19 Q. Do you understand that to be a
20 purpose of the step?

21 MR. COHN: Objection. In other
22 words, is he agreeing it's a purpose or has
23 he heard someone else claim that?

24 MR. WEBER: No, I'm asking do you
25 understand that to be a purpose?

1 MR. COHN: Objection, it's not
2 clear what you're asking.

3 THE WITNESS: I heard testimony
4 yesterday with that purpose stated.

5 BY MR. WEBER:

6 Q. Was that the first time you ever
7 heard that purpose?

8 A. No.

9 Q. Okay. When had you heard that
10 purpose stated earlier?

11 MR. COHN: Other than by counsel
12 perhaps.

13 THE WITNESS: I saw it on the Web.

14 BY MR. WEBER:

15 Q. You saw it on his website?

16 A. Yes.

17 Q. And by him, I mean Insite Solutions?

18 A. That is accurate.

19 Q. And do you also see a tapered edge?

20 A. Yes.

21 Q. And does the thickness of the polymer
22 layer change throughout the region of the
23 tapered edge?

24 A. You're speaking here?

25 Q. Well, there or here, where you can

1 see it larger in the area you circled?

2 A. In this area it changes, the
3 thickness of the profile changes.

4 Q. Okay. Can you mark that with the
5 letter A, what you've just drawn there?

6 A. (Doing as requested.)

7 Q. So the thickness changes at least in
8 the ramped area and do you also see the
9 radius, .187?

10 A. Yes.

11 Q. What do you understand that to be?

12 A. An angle.

13 Q. Or a radius?

14 A. A radius.

15 Q. And that's the radius of where the
16 ramp blends into the remainder of the surface
17 of the polymer layer?

18 A. The majority of the polymer layer,
19 yes.

20 Q. Okay. And what do you understand the
21 purpose of the ramp to be?

22 A. The same thing as my floor tape, the
23 bevelled edge.

24 Q. To do what?

25 A. Well, skids are dragged over it, to

1 help them slide across it rather than catch
2 on the edge.

3 Q. Your warranty excludes that type of
4 damage, doesn't it?

5 A. Yes.

6 Q. And it always has, hasn't it?

7 A. Yes.

8 Q. And the Ergomat warranty also
9 excludes it, doesn't it?

10 A. I don't know.

11 Q. You don't know whether Ergomat's
12 warranty excludes it?

13 A. I don't know.

14 Q. And you circled the front page of
15 Exhibit 17, the region. Do you recognize the
16 other two pages as showing the same tape or
17 polymer layer but for different widths of
18 tape?

19 A. Across the different pages you're
20 talking about?

21 Q. Yes.

22 A. Yes.

23 MR. WEBER: Okay.

24 (Defendant's Exhibit

25 No. 18 was marked

1 for identification.)

2 BY MR. WEBER:

3 Q. Do you recognize Exhibit 18?

4 A. Yes.

5 Q. And what is Exhibit 18?

6 A. It's the Patent Office review of the
7 '480 patent and opening it back up again.

8 Q. Well, they opened it back up again
9 and they've rejected all of the claims of
10 patent, haven't they?

11 A. Yes.

12 Q. Did you ask the Patent Office to
13 re-open or to re-examine this patent or did
14 someone else ask that they re-examine it?

15 A. I did not ask.

16 Q. Do you know who did?

17 A. Yes.

18 Q. Who?

19 A. Creative Safety.

20 Q. And Creative Safety is a company
21 where?

22 A. Out on the West Coast.

23 Q. Oregon?

24 A. Either Oregon or Washington.

25 Q. Okay.

1 A. I think it's Oregon.

2 Q. Had you brought a lawsuit against
3 them on your '480 patent?

4 A. Yes.

5 Q. Were you surprised by this office
6 action that rejects all of the claims?

7 A. No.

8 Q. Did you expect it?

9 A. No.

10 Q. So you were neither surprised nor did
11 you expect it, what -- have you reviewed the
12 office action?

13 A. Yes.

14 Q. Do you think the Examiner is
15 correct?

16 MR. COHN: Objection.

17 MR. WEBER: Well, it's your
18 patent.

19 MR. COHN: But he's not a patent
20 lawyer.

21 MR. WEBER: He doesn't have to be
22 a patent lawyer.

23 THE WITNESS: No.

24 BY MR. WEBER:

25 Q. You don't think the Examiner is

1 correct?

2 A. No.

3 Q. Where did the Examiner go wrong?

4 MR. COHN: Objection.

5 THE WITNESS: In consultations
6 with my attorneys, we've discussed that, it's
7 a privileged matter.

8 BY MR. WEBER:

9 Q. Well, it's a privileged matter that's
10 going to be put into a response to the Patent
11 Office, isn't it?

12 A. That might be.

13 MR. COHN: It's from his lawyer.

14 BY MR. WEBER:

15 Q. Well, do you have an opinion -- I
16 don't want to hear what your attorney told
17 you nor what you told your attorney -- do
18 you have an opinion as to why the Examiner
19 is wrong in this rejection?

20 MR. COHN: Objection. If your
21 opinion is what your lawyer told you, I
22 instruct you not to divulge it. If you have
23 some opinion that you've reached
24 independently of anything your lawyer said
25 and you wish to express it, you may do so.

1 THE WITNESS: My opinion is that
2 once I came out with a floor tape, I had
3 three other companies that distributed the
4 product and after they decided that they
5 could make more money, decided to knock it
6 off and copy it. It has enjoyed pretty
7 fabulous success since its start.

8 BY MR. WEBER:

9 Q. Well, why, to what do you attribute
10 this success, were these people good at
11 selling?

12 A. It wasn't only the people that
13 knocked it off, it was, I attribute the
14 success, the market reception to a good, a
15 very good product that fills a need.

16 Q. Well, what, besides being a good
17 product, to what do you attribute the success
18 of the product?

19 MR. COHN: Objection.

20 THE WITNESS: The market
21 acceptance of the product.

22 BY MR. WEBER:

23 Q. Well, did you or any of your
24 distributors, did they advertise and promote
25 this product?

1 A. The product is advertised and
2 promoted via many distributors.

3 Q. Well, is that what developed the
4 market for it, the advertising and
5 promotion?

6 A. Certainly it helped.

7 Q. Who are the, who besides Ergomat was
8 selling this product for you?

9 A. Insite Solutions, Creative Safety.

10 Q. And who else, anybody, I mean Insite
11 Solutions, Creative Safety and Ergomat, was
12 anybody else selling it for you?

13 A. Many distributors were selling it for
14 me.

15 Q. Okay. Were they distributors of
16 yours or were the distributors of Ergomat,
17 Creative Safety and Insite?

18 A. Distributors of mine.

19 Q. Okay. Are the distributors of yours
20 still distributing?

21 A. Yes.

22 Q. Now, do you provide them with
23 advertising and promotional material?

24 A. Yes.

25 Q. Okay. Do any of them generate their

1 own advertising and promotional material?

2 A. Occasionally. Oftentimes we're
3 relied on to provide it.

4 Q. How did you receive Exhibit 18?

5 A. I'm not clear as to what you mean how
6 did I receive it?

7 Q. Did your attorney send you a copy?

8 A. I received a copy in e-mail, yes.

9 Q. An e-mailed copy, okay. And when you
10 received that e-mailed copy did you sit down
11 and study the office action?

12 A. I have studied it.

13 Q. Okay. Did you study it before
14 meeting with your attorney?

15 A. No.

16 Q. You didn't. I mean this came as
17 somewhat of a bombshell to you, didn't it?

18 MR. COHN: Objection.

19 THE WITNESS: I see no, I really
20 don't see the relevance of whether it's a
21 bombshell to me or not or what it means to
22 this whole proceeding.

23 BY MR. WEBER:

24 Q. Well, okay, and I don't want to fence
25 with you in that regard but did you, you're

1 saying that you didn't look at this or study
2 this?

3 A. I have looked at it.

4 Q. Prior to meeting with your attorneys?

5 A. After I looked at it I have met with
6 my attorneys.

7 Q. Okay. Well, when you looked at it
8 before meeting with your attorneys did you --
9 what conclusions if any did you draw as to
10 the efficacy of the Examiner's position?

11 MR. COHN: Objection.

12 MR. WEBER: Or the merits of the
13 Examiner's position?

14 THE WITNESS: As of this point I
15 have drawn no conclusions.

16 BY MR. WEBER:

17 Q. Okay. Even as you sit here today?

18 A. Even as I sit here today.

19 Q. Now, there's a response due in about
20 a little over a week, right, to this office
21 action?

22 A. That's correct.

23 Q. Now, will you see a copy of the
24 response before it goes in?

25 A. Absolutely.

1 Q. And you'll review it?

2 A. Absolutely.

3 Q. And it won't go in unless you approve
4 it?

5 A. That's correct.

6 (Defendant's Exhibit
7 Nos. 19 and 20 marked
8 for identification.)

9 BY MR. WEBER:

10 Q. Okay, do you recognize Exhibits 19
11 and 20?

12 A. Yes.

13 Q. And you've studied those?

14 A. I've perused them.

15 Q. Okay, you've just perused them, and
16 you're going to rely on your attorneys to
17 study them and prepare arguments in response
18 to the office action, right?

19 A. Yes.

20 Q. All right. Prior to meeting with
21 your attorneys, had you formed any opinions
22 as to the relevance of Murata or Kjellqvist,
23 these two patents?

24 A. No.

25 Q. Were you made aware of these patents

1 by the attorneys for Creative Safety prior to
2 the re-exam proceedings?

3 A. No.

4 Q. So you only became aware of these
5 through the re-examination proceedings; is
6 that correct?

7 A. That's correct.

8 (Defendant's Exhibit
9 No. 21 was marked
10 for identification.)

11 BY MR. WEBER:

12 Q. Do you recognize Exhibit 21?

13 A. Yes.

14 Q. And do you recognize that as a chart
15 that correlates Shore A and Shore D hardness?

16 A. Yes.

17 Q. Could you on what you've got there go
18 up and draw a horizontal line across to
19 intersect the graph at the Shore A hardness
20 of 92, and if you want a straight edge I can
21 give it to you?

22 A. Somewhere around there I guess.

23 Q. Okay, let me see what you marked.

24 A. (Doing as requested.)

25 Q. Okay. Now, the Shore A hardness

1 loses much of its resolution up in that area,
2 doesn't it, the Shore A hardness?

3 MR. COHN: Objection.

4 BY MR. WEBER:

5 Q. Well, it flattens out, doesn't it?

6 A. Yes.

7 Q. And so a Shore A hardness, even on
8 where you marked Shore A 92, from 92 to 100,
9 which is only a spread of eight on the Shore
10 A graph, correlates to what on the Shore D
11 scale?

12 A. From 92 to --

13 Q. Do you want to use a straight edge to
14 find where it goes?

15 A. What were you measuring from?

16 Q. 92.

17 A. To?

18 Q. On the Shore A.

19 A. Okay, but you were going Shore A 92
20 to what Shore A or just 92?

21 Q. Well, 92 to 100 on Shore, I mean
22 that's where they all peak out, right, a
23 hundred?

24 A. Yes.

25 Q. Okay.

1 A. Yes. Looks like that correlates to a
2 Shore 50 to Shore 95.

3 Q. Okay.

4 A. On Shore D hardness.

5 Q. So on Shore D you get a spread of 45
6 measurement points, where you're only
7 measuring eight measurement points on Shore
8 A, right?

9 A. For this Apilon TPU material.

10 Q. What is Apilon TPU materials?

11 A. I don't know.

12 Q. I'm trying to read where you were
13 reading?

14 MR. COHN: The bottom line.

15 BY MR. WEBER:

16 Q. Okay. Shore hardness A and D scales
17 for Apilon 52 TPU materials, do you know what
18 TPU stands for?

19 A. No.

20 Q. Do you agree that Shore hardness
21 reduces as temperature rises?

22 A. Generally.

23 Q. When you presented the Shore A
24 hardness ranges in your patent, at what
25 temperature were those specified?

1 A. They weren't.

2 (Defendant's Exhibit

3 No. 22 was marked

4 for identification.)

5 BY MR. WEBER:

6 Q. I've handed you what's been marked

7 as Exhibit 22, do you recognize that

8 document? These are the initial disclosures

9 that ShieldMark presented in this case.

10 A. Yes.

11 Q. Okay. And number one is individuals

12 likely to have discoverable information, do

13 you see that?

14 A. Yes.

15 Q. And the two people listed are you and

16 Mr. Lowe from Insite, correct?

17 A. Yes.

18 Q. As I sit here today it sounds like

19 there are other people that would have had

20 discoverable information, like Phil Nye, he

21 certainly would have information regarding

22 the development of your patented concept and

23 product, wouldn't he?

24 MR. COHN: Is there no end to your

25 picking on Mr. Goecke for what his lawyers

1 have done?

2 MR. WEBER: I'm not picking on
3 him, I'm asking if Mr. Nye, I'm not laying
4 any blame or whatever.

5 MR. COHN: Well, you phrased that
6 very argumentatively.

7 MR. WEBER: Would Mr. Nye have had
8 discoverable information regarding your
9 lawsuit?

10 MR. COHN: Objection.

11 THE WITNESS: Yes.

12 BY MR. WEBER:

13 Q. Would the people to whom you sold
14 your polycarbonate product or your
15 thermoplastic elastomer product and your
16 first PVC material products have had
17 discoverable information that would be
18 relevant to your lawsuit?

19 MR. COHN: Objection. Do you
20 really think he's learned in what is
21 discoverable under the Federal Rules of Civil
22 Procedure?

23 MR. WEBER: I think he does.
24 Well, he's filed three lawsuits, four now
25 that I'm aware of. But would those have been

1 people that would have information, let's say
2 regarding the development, reduction to
3 practice and initial sales of products during
4 your development period?

5 MR. COHN: Objection.

6 THE WITNESS: Would what people?

7 BY MR. WEBER:

8 Q. The people to whom you sold the
9 polycarbonate thermoplastic elastomer?

10 A. No.

11 Q. Well, they would know that they had
12 purchased this product, wouldn't they?

13 A. Yes.

14 Q. And they would know the dates on
15 which they purchased the product, wouldn't
16 they?

17 A. Yes.

18 Q. And they would know how you offered
19 these products for sale to them, wouldn't
20 they?

21 A. Yes.

22 Q. Does Mr. Nye, did Mr. Nye have any
23 associates working with him at Advanced
24 Plastics at the time you were developing this
25 product?

1 A. He has a workforce that works for
2 him.

3 Q. Are there any members of the
4 workforce that you worked with in this
5 undertaking of developing the '480 patent?

6 A. No.

7 Q. There were none, you only worked with
8 Mr. Nye?

9 A. That is correct.

10 Q. Have you destroyed or erased or
11 gotten rid of any documents or data relevant
12 to the conception or reduction to practice,
13 development, testing, offering for sale and
14 initial marketing efforts of the various
15 products that led to the '480 patent?

16 A. No.

17 Q. Okay. Ever, is that correct?

18 A. Correct.

19 Q. Okay. So you still have those
20 available, is that fair to say?

21 A. I have what is still around, that
22 didn't get thrown out in the normal course
23 of business. I can't say that I have a
24 hundred percent of everything that I sold; I
25 have a good majority of it.

1 Q. Well, what gets thrown out in the
2 normal course of business?

3 A. Just information that if it found its
4 way into a file that got pitched. I'm just
5 saying that I have the majority of the
6 information from inception of this product as
7 far as what, what we sold.

8 (Defendant's Exhibit
9 No. 23 was marked
10 for identification.)

11 BY MR. WEBER:

12 Q. Do you recognize Exhibit 23?

13 A. Yes.

14 Q. What is it?

15 A. What's that?

16 Q. What is it?

17 A. It's a chart on peel adhesion.

18 Q. And where did this come from? I mean
19 it was provided to us from by your counsel.

20 A. I don't know.

21 Q. What use if any did you ever make of
22 it?

23 A. I haven't made any use of it.

24 Q. Do you know if Mr. Nye ever made any
25 use of it?

1 A. No.

2 Q. You don't know?

3 A. No, I know Mr. Nye never made use of
4 it.

5 MR. WEBER: Okay.

6 (Defendant's Exhibit
7 No. 24 was marked
8 for identification.)

9 BY MR. WEBER:

10 Q. Do you recognize Exhibit 24?

11 A. Yes.

12 Q. And it's a compilation of documents
13 that are called assignments so what, can you
14 just explain to me what this compilation is
15 or what it relates to, or do we have to look
16 at each one individually?

17 A. It's assignment of the patents from
18 my name to my company's name.

19 Q. So these are patents or patent
20 applications, it looks like they might be
21 both.

22 MR. COHN: Objection. Is that a
23 question?

24 BY MR. WEBER:

25 Q. I was wondering if you were done

1 commenting, I was waiting for you to finish.
2 But if you're done, this first one is called
3 assignment, it makes reference to the '480
4 patent, right?

5 A. Uh-huh.

6 Q. And you've signed it as on behalf of
7 both parties to the assignment, correct?

8 A. That's correct.

9 Q. Okay. And what was the purpose of
10 this instrument?

11 A. To assign the patent to ShieldMark.

12 Q. The '480 patent?

13 A. Yes.

14 Q. No, I don't think that's the case.

15 MR. COHN: No, it's not.

16 BY MR. WEBER:

17 Q. I guess these documents will speak
18 for themselves, let me just ask you to look
19 at the signature pages of them, okay?

20 A. Okay.

21 Q. On page three that bears control
22 number 2227, is that your signature
23 personally and on behalf of your company?

24 A. Yes.

25 Q. And on 2229, is that your signature?

1 A. What is the 2229 and 2227 that you're
2 referring to?

3 Q. They're the numbers in the lower
4 right-hand corner, I'm dropping the zeros, so
5 do you see on the third page of this whole
6 stack.

7 A. Okay.

8 Q. There's a 2227?

9 A. Okay.

10 Q. Now those are your signatures, right?

11 A. Yes, they are.

12 Q. And you signed them about January 3rd
13 of this year, right?

14 A. That's correct.

15 Q. And then on 2229, is that your
16 signature?

17 A. Yes, it is.

18 Q. And you signed that on June 16th of
19 '05, is that fair to say?

20 A. Yes.

21 Q. And then on 2232, is that your
22 signature both personally and on behalf of
23 ShieldMark?

24 A. Yes.

25 Q. And that was signed November 28th,

1 2012?

2 A. Yes.

3 Q. And 2235, you signed that again on
4 behalf of yourself and corporately?

5 A. Yes.

6 Q. And these assignments are for
7 continuation applications off of the '480
8 patent?

9 Well, they are what they state
10 they are, but is it your understanding that
11 the purpose of this was to assign
12 continuation applications to your company?

13 A. Yes.

14 Q. And those are continuations off of
15 the '480 patent, right?

16 A. Correct.

17 MR. WEBER: Okay.

18 (Defendant's Exhibit
19 No. 25 was marked
20 for identification.)

21 BY MR. WEBER:

22 Q. Let's move on to Exhibit 25, do you
23 recognize that? These are documents you
24 provided us, what are these?

25 A. Just web pages off Insite Solutions.

1 Q. Okay. These came from your files?

2 A. Yes.

3 Q. And you kept these in your business
4 records?

5 A. Yes.

6 Q. Why?

7 A. I'm trying to recall. Was this not
8 a response to your request for documents?

9 Q. Yeah, that's the reason I have it,
10 my question was, what was the reason you
11 have it?

12 A. Because we had them in our files and
13 you requested them.

14 Q. Well, no, I understand that, but why
15 were they in your files?

16 A. I don't know.

17 Q. It fair to say those documents all
18 deal with Insite or Mr. Lowe?

19 A. Yes, and DuraStripe tape.

20 (Defendant's Exhibit
21 No. 26 was marked
22 for identification.)

23 BY MR. WEBER:

24 Q. Do you recognize Exhibit 26?

25 A. Yes.

1 Q. And who is Anie Simard, was I close
2 on that?

3 A. She's an employee at Ergomat.

4 Q. And this is a letter she wrote to Mr.
5 Lowe or an e-mail she sent to Mr. Lowe?

6 A. That's correct.

7 Q. And who is Claus Lendal?

8 A. He is the manager of Ergomat USA.

9 Q. Who is John Girard?

10 A. He is an employee at Ergomat.

11 Q. Karen Taylor?

12 A. She is an accountant at Ergomat.

13 Q. You are the T. Goecke and who is Amy
14 at stop-painting.com?

15 A. I believe that's an employee of
16 Cliff's.

17 Q. And Terry McHale?

18 A. An employee at Ergomat.

19 Q. Why were you copied on this, if you
20 know?

21 MR. COHN: Objection.

22 THE WITNESS: I don't know.

23 BY MR. WEBER:

24 Q. This was July 24th of 2012, had Mr.
25 Lowe or Insite Solutions been telling the

1 trade that Ergomat could not sell

2 DuraStripe?

3 A. I don't know.

4 Q. And you see in bold there that Ms.

5 Simard has said, "Ergomat is entitled to sell

6 DuraStripe and will continue to do so for

7 years to come," did I read that correctly?

8 A. Yes.

9 Q. Do you know what threats Mr. Lowe or

10 Insite had been making to the dealers of

11 Ergomat?

12 A. No.

13 Q. Do you know what threats, lies,

14 anything of that nature?

15 A. I don't know.

16 Q. And then this is captioned as "the

17 one and only friendly reminder." Does that

18 look like a friendly reminder to you?

19 I mean did you take this as a

20 friendly reminder when you saw it, did you

21 say, yeah, I'm sure Mr. Lowe will accept this

22 as a friendly reminder?

23 A. I don't think it makes a whole lot of

24 difference what I think about this.

25 Q. Well, it does to me and it does to

1 the record so I'd like an answer.

2 MR. COHN: Well, objection, but
3 you can answer.

4 MR. WEBER: Eighty percent of your
5 deposition yesterday had nothing to do with
6 the lawsuit either but I tolerated it.

7 MR. COHN: And I said he can
8 answer.

9 MR. WEBER: And I appreciate it.

10 THE WITNESS: Could she have put
11 it in a more cordial fashion, yes.

12 BY MR. WEBER:

13 Q. Do you know Anie?

14 A. Yes.

15 Q. Personally? Do you know her
16 socially?

17 A. No.

18 Q. Is she related to any of the
19 principals of Ergomat?

20 A. Yes.

21 Q. Who?

22 A. Claus.

23 Q. And how is she related to Claus?

24 A. She's his wife.

25 Q. Is Ergomat owned by Claus Lendal?

1 A. I don't know.

2 MR. WEBER: Okay.

3 (Defendant's Exhibit

4 No. 27 was marked

5 for identification.)

6 BY MR. WEBER:

7 Q. Do you recognize Exhibit 27?

8 A. Yes.

9 Q. And did you review this letter before
10 it was sent?

11 A. Yes.

12 Q. And you authorized it being sent; is
13 that correct?

14 A. Yes.

15 Q. And this was sent to Mr. Lowe,
16 telling him that your patent application had
17 published, correct?

18 A. That's correct.

19 Q. And you were warning him of all the
20 things that could happen if he persisted in
21 his present actions, right?

22 MR. COHN: When you say you, you
23 mean through his counsel?

24 BY MR. WEBER:

25 Q. Yeah, well, was -- let me ask you

1 this, was Mr. Harders writing this on his own
2 or on behalf of his firm?

3 A. He wrote that on behalf of
4 ShieldMark.

5 Q. Okay. And you approved it before it
6 went out, right?

7 A. That's correct.

8 Q. So it was basically you saying this,
9 or at least Mr. Harders saying it on your
10 behalf, correct?

11 A. That's correct.

12 Q. Okay. And when you read this and you
13 saw that for there to be liability for a
14 reasonable royalty based on knowledge of the
15 published patent application that the
16 infringed claim had to be, quote,
17 substantially identical to a claim in the
18 patent issued from the publication, end
19 quote, do you know what that meant?

20 A. I'm not a patent lawyer.

21 Q. Well, I know you're not a patent
22 lawyer but did you know what that meant?

23 A. Yes.

24 Q. Okay. And you actively participated
25 in a prosecution of a patent that went

1 through at least four amendments, correct?

2 A. That's correct.

3 Q. And then you authorized the filing of
4 a lawsuit that sought recovery of pre-issue
5 damages, didn't you?

6 A. That's correct.

7 Q. And yet when I asked you if you could
8 tell me if there was a substantial similarity
9 between the issued patent claims and the
10 published claims, you declined to do so,
11 didn't you?

12 A. You were asking me to become a patent
13 lawyer; I am not a patent lawyer.

14 Q. And you declined to do so, didn't
15 you?

16 A. I did.

17 Q. Well, did you rely on advice of
18 counsel for mailing this letter?

19 A. Yes, I did.

20 (Defendant's Exhibit
21 No. 28 was marked
22 for identification.)

23 BY MR. WEBER:

24 Q. Do you recognize Exhibit 28?

25 A. Yes.

1 Q. And what is it?

2 A. It's a letter to Terry McHale at
3 Ergomat.

4 Q. And also to Phil, right, Phil Nye?

5 A. Yes.

6 Q. And you tell them to see the
7 attached file, and what does the attached
8 file say? You address it specifically to
9 Terry McHale, right?

10 A. Yes.

11 Q. And down a little bit you say, "At
12 this point I have a published patent
13 application. Below is some information on
14 just what this means." Where did you get
15 that information from?

16 A. I believe I got it from the uspto
17 website.

18 Q. And then the last paragraph of your
19 writing it says, "I will be getting in touch
20 with my lawyer to find out what sort of
21 letter and action we should now be taking
22 against the stop-painting.com folks," right?

23 A. That's correct.

24 Q. So you were ready to spring into
25 action, right, with your patent publication?

1 A. Yes.

2 Q. Okay. Did you get in touch with your
3 lawyer?

4 A. Yes.

5 Q. Which lawyer?

6 A. Scott Harders.

7 MR. WEBER: Okay.

8 (Defendant's Exhibit

9 No. 29 was marked

10 for identification.)

11 BY MR. WEBER:

12 Q. Do you recognize Exhibit 29?

13 A. Yes.

14 Q. And what is it?

15 A. It was a Chemsultants report on
16 different testing of competitors' products.

17 Q. Do you see over on the second page,
18 under peel adhesion --

19 MR. COHN: If you notice this
20 Exhibit 29 is marked subject to protective
21 order.

22 MR. WEBER: Yeah.

23 MR. COHN: If you're going to
24 examine him on it, you're disclosing the
25 contents to Mr. Lowe.

1 MR. WEBER: No, we have a two tier
2 protective order. This doesn't say
3 attorney's eyes only, it's confidential
4 subject to protective order. There's two
5 tiers. I mean I don't think I'm going to
6 make it that difficult so I think we can
7 probably --

8 MR. COHN: Well, with regard to
9 the deposition questions, I'll assert the
10 order.

11 MR. WEBER: Okay.

12 BY MR. WEBER:

13 Q. All right. Over on the second page,
14 and this can hardly be attorney/client
15 privilege or attorney's eyes only, do you see
16 peel adhesion?

17 A. Yes.

18 Q. Okay. And what test method was used
19 by Chemsultants to test peel adhesion?

20 A. PSTC-101 method F.

21 Q. Not method D, right?

22 A. That's correct.

23 MR. WEBER: Okay. I want to ask
24 you to look at these three and tell me if you
25 are serious, that you're going to say that's

1 attorney's eyes only, when those are the
2 basis of other lawsuits and we know about the
3 existence of those otherwise, that's the
4 exact same as another exhibit we've seen.
5 I'm just trying to expedite this.

6 MR. HARDERS: I think this is
7 level one.

8 MR. WEBER: So we'll mark these.

9 (Defendant's Exhibit
10 Nos. 30 through 32 marked
11 for identification.)

12 BY MR. WEBER:

13 Q. Do you recognize Exhibits 30, 31 and
14 32?

15 A. Yes.

16 Q. And what are they?

17 A. Notification to Creative Safety,
18 Ergomat and Insite that we obtained the
19 patent, ShieldMark obtained the patent. And
20 inviting them -- hold on.

21 Q. Well, you invited a business
22 resolution, right?

23 A. Yes, that's correct.

24 Q. You say ShieldMark's patented
25 technology provides -- by the way, all three

1 of these letters are identical, right, except
2 for the addressee?

3 A. Yes.

4 Q. Okay. Down in the second paragraph
5 on the first page, "ShieldMark's patented
6 technology provides numerous benefits,
7 including superior ductility, strength and
8 tear and abrasion resistance, and I assume
9 InSite would like to be able to offer this
10 superior product to its customers."

11 MR. COHN: Objection, because of
12 Rule 408 these are all inappropriate
13 discovery so I object.

14 MR. WEBER: This is inappropriate
15 discovery about a letter that he sent to Mr.
16 Lowe?

17 MR. COHN: A Rule 408, yes.

18 MR. WEBER: Where do I see a Rule
19 408?

20 MR. COHN: I don't have to recite
21 Rule 408 to be Rule 408.

22 MR. WEBER: Oh, this was a
23 gracious offer of settlement, okay, all
24 right. But let me -- when you sent these
25 letters, had you already filed your

1 lawsuits?

2 MR. COHN: You mean when his
3 lawyer sent them?

4 MR. WEBER: Yeah, when your lawyer
5 sent the letters, had you already filed the
6 lawsuits.

7 THE WITNESS: Yes.

8 BY MR. WEBER:

9 Q. Why had you done that?

10 A. To convey the importance of it.

11 Q. Okay. Did anyone take you up on your
12 offer?

13 MR. COHN: Same objection, Rule
14 408.

15 THE WITNESS: We came to an
16 agreement with Ergomat.

17 MR. WEBER: Okay, let's look at
18 Exhibit 33 and this is attorney's eyes only
19 so I don't want you to -- we'll get it marked
20 and then we'll go from there.

21 (Defendant's Exhibit
22 No. 33 was marked
23 for identification.)

24 BY MR. WEBER:

25 Q. Do you have Exhibit 33?

1 A. Yes.

2 Q. And you recognize it?

3 MR. COHN: That's a yes or no.

4 THE WITNESS: Yes.

5 BY MR. WEBER:

6 Q. And back on page nine -- and you
7 don't need to identify anybody or anything,
8 although I see your signature and I see
9 somebody who is probably related to you,
10 their signature, but I don't see a signature
11 by the other party. Was this actually signed
12 by the other party?

13 A. Yes, it was.

14 Q. You have a signed copy of it?

15 A. Yes, I do.

16 Q. And so this was an agreement that
17 took place then and was effective on the date
18 written up in the first paragraph of the
19 agreement; is that correct?

20 A. That's correct.

21 MR. WEBER: All right.

22 (Defendant's Exhibit
23 No. 34 was marked
24 for identification.)

25 BY MR. WEBER:

1 Q. Do you recognize Exhibit 34?

2 A. Yes.

3 Q. And what is it?

4 A. It's a trademark.

5 Q. It's evidence of a trademark

6 registration, is that what you --

7 A. Correct.

8 Q. And that's for the trademark

9 DuraStripe?

10 A. That's also correct.

11 Q. And this registration is owned by

12 Tinby LLC; is that correct?

13 A. That's correct.

14 Q. Who is Tinby LLC? Or I'm sorry, it's

15 Tiny LLC corporation?

16 A. A parent company of Ergomat or

17 however they're related.

18 Q. So the registrant, the actual owner

19 of the mark is not Ergomat, is that your

20 understanding?

21 MR. COHN: Objection.

22 THE WITNESS: That would be my

23 understanding.

24 BY MR. WEBER:

25 Q. Okay. And is this the registration

1 for the mark under which Ergomat sells your
2 product?

3 A. When they did sell my product at one
4 time.

5 Q. Are they no longer selling your
6 product under this mark?

7 A. That's correct.

8 Q. But they are selling a product under
9 the mark?

10 A. That's correct.

11 Q. Is the product of the same nature and
12 quality as when you were providing it?

13 A. I don't know that.

14 Q. You haven't gotten any samples of
15 their product to test?

16 A. We tested samples at Chemsultants.

17 Q. Well, the reason I ask is you had
18 testified earlier that obviously when they
19 were buying from you, it was you who was
20 controlling the nature and quality of the
21 goods?

22 MR. COHN: That's not what he
23 said.

24 BY MR. WEBER:

25 Q. Oh, he didn't?

1 A. No, I said Advanced was.

2 Q. Oh, Advanced was, okay, I apologize.

3 But Advanced is not doing that now, correct?

4 A. That's correct.

5 MR. WEBER: Okay.

6 (Defendant's Exhibit

7 No. 35 was marked

8 for identification.)

9 BY MR. WEBER:

10 Q. Do you recognize Exhibit 35? And I

11 apologize, the underlining that's on there

12 was not in the original.

13 A. Yes, I recognize it.

14 Q. Okay. Is that Mr. Nye in the

15 pictures there?

16 A. Yes.

17 Q. In both pictures? The one is sort of

18 hard to see.

19 A. Yes.

20 Q. So Mr. Nye, up on the top of page two

21 in the partial paragraph, about the second

22 line, "Advanced Plastics was founded on

23 September 15, 1999, when Phil and his partner

24 became the owners of the business formerly

25 known as Almetco," do you see that?

1 A. Uh-huh.

2 Q. Do you know who his partner was?

3 A. Who Phil's partner is.

4 Q. Okay.

5 A. Yes.

6 Q. And who is it?

7 A. John Davis.

8 Q. John Davis?

9 A. Yes.

10 Q. Did you have any dealings with Mr.
11 Davis in your development or manufacturing
12 efforts of your '480 product?

13 A. No.

14 Q. What is Mr. Davis' background, do you
15 know?

16 A. He's a CPA.

17 Q. What's his first name?

18 A. John.

19 Q. John. And you see in the indented
20 section here that's written in italics, down
21 in the next to last paragraph in italics,
22 the last sentence of that paragraph says --
23 well, that whole paragraph deals with Ergomat
24 and DuraStripe.

25 And the last sentence says,

1 "In addition to manufacturing the product,
2 we also provided the inventor of DuraStripe
3 with design support and the recommendation
4 for the material that gives DuraStripe its
5 unique qualities," did I read that
6 correctly?

7 A. Yes.

8 Q. Is that an accurate statement?

9 A. No.

10 Q. That's not accurate?

11 A. No.

12 Q. What's inaccurate about it?

13 A. The recommendation for material.

14 It's accurate as far as design support for
15 making the molds and marking the material for
16 DuraStripe with the DuraStripe stamp that
17 went on every roll.

18 Q. But did anybody make recommendations
19 for the material to you?

20 A. Yes.

21 Q. Who?

22 A. Phil Nye. But the '480 patent was
23 not a recommendation from Phil Nye for the
24 material.

25 Q. Okay, what was it that Phil Nye

1 recommended? And I apologize, I'm missing
2 this.

3 A. Thermoplastic elastomer.

4 Q. He didn't recommend the
5 polycarbonate?

6 A. No.

7 Q. And he didn't recommend the PVC?

8 A. That's correct.

9 MR. WEBER: Okay.

10 (Defendant's Exhibit
11 No. 36 was marked
12 for identification.)

13 BY MR. WEBER:

14 Q. Do you recognize Exhibit 36?

15 A. This is the first time I've seen it
16 but I recognize Advanced Plastics.

17 Q. Do you recognize the product that's
18 in the block on the second page, in the
19 vertical block?

20 A. Yes.

21 Q. And what is that?

22 A. That is the four inch tape.

23 Q. The Ergomat tape or the DuraStripe
24 tape?

25 A. I can't tell by the picture.

1 Q. Well, okay, when you said the tape,
2 what tape did you mean, or just generically?

3 A. Since Phil Nye only makes tape, floor
4 tape products on my behalf, and doesn't make
5 them for anybody else, I would have to assume
6 that that is floor tape from us.

7 Q. Okay.

8 A. When the picture was taken, I don't
9 know.

10 Q. All right.

11 A. I can't tell by the picture what.

12 Q. That's fair enough, okay.

13 MR. WEBER: Let's look at 37.

14 (Defendant's Exhibit

15 No. 37 was marked

16 for identification.)

17 BY MR. WEBER:

18 Q. Do you recognize Exhibit 37?

19 A. Yes, I do.

20 Q. And this is -- well, what is it?

21 A. Ergomat brochure advertising the
22 DuraStripe product.

23 Q. Was this a DuraStripe product made
24 according to the '480 patent?

25 A. Yes.

1 Q. And you see the two year warranty
2 down at the bottom on the left?

3 A. Yes.

4 Q. Okay. It says, "DuraStripe is
5 conditionally warranted against failure for
6 two years from the date of purchase.
7 Warranty does not cover damage caused by
8 items pushed or dragged across the product,
9 such as skids or pallets. Warranty claims
10 are limited to replacement of DuraStripe for
11 damaged sections at no charge." Did I read
12 that correctly?

13 A. Yes.

14 Q. Aren't these floor marking tapes
15 often used in areas where they're subject to
16 items that are pushed or dragged across them,
17 such as skids or pallets?

18 A. Oftentimes, yes.

19 Q. But the warranty didn't cover that,
20 correct?

21 A. That is correct. If a skid weighs
22 five thousand pounds or if it's got nails
23 sticking out of it, chances are you're going
24 to tear it up as it's dragged across it.

25 Q. Well, that isn't what the warranty

1 says, that isn't the exclusion of the
2 warranty though, is it?

3 A. That would be my understanding of
4 it.

5 Q. Well, no, it doesn't say anything
6 about nails sticking out of anything or any
7 weight, it talks about uncovered damage
8 caused by items pushed or dragged across the
9 product, such as skids or pallets, doesn't
10 it?

11 A. My answer is a business reply to that
12 question.

13 Q. And you have the same exclusion for
14 yours, right?

15 A. I have an exclusion that is similar.

16 Q. I think you have a three year
17 warranty, don't you?

18 A. I do.

19 Q. I mean if you do that type of an
20 exclusion, you could warrant it almost
21 forever, couldn't you?

22 A. Forever is a long time.

23 Q. No, but you could extend that
24 warranty out five years or more with no
25 concerns, couldn't you?

1 MR. COHN: Do you want to debate
2 him on the warranty, is that where we're
3 going now?

4 MR. WEBER: Could you?

5 MR. COHN: Objection.

6 THE WITNESS: The decision to
7 establish a warranty and put it in place is
8 my decision based on sound business
9 practice.

10 MR. WEBER: And what was the, what
11 were the sound business practices?

12 MR. COHN: He's already answered
13 that.

14 MR. WEBER: I'm just too slow I
15 guess, it's too late.

16 MR. COHN: You just want to go
17 over things.

18 MR. WEBER: Go ahead.

19 THE WITNESS: We provide a very
20 decent warranty for our product. You can
21 drive over it with tow motors, clean it with
22 industrial brush scrubbers. We do not
23 warranty it for the dragging and pulling of
24 skids.

25 BY MR. WEBER:

1 Q. Your product doesn't have the
2 undercut recess for the adhesive, does it?

3 A. No, it does not.

4 (Defendant's Exhibit
5 No. 38 was marked
6 for identification.)

7 BY MR. WEBER:

8 Q. Do you recognize Exhibit 38?

9 A. Yes.

10 Q. And is this again for a product
11 that's made according to the '480 patent?

12 A. Yes.

13 Q. I see here that this is sold in
14 hundred foot rolls, is that your typical size
15 of selling this product?

16 A. That's not a typical size, it is
17 something that we implemented and several of
18 our competitors that copied our product also
19 made it in the same size rolls as we did.

20 Q. Okay. What size rolls does it come
21 in?

22 A. A hundred feet.

23 Q. Okay. Well, does it come in any
24 other lengths?

25 A. No.

1 Q. Okay. And the extrusion process of
2 manufacturing is what enables you to put them
3 in those hundred foot rolls, isn't it?

4 A. Yes.

5 Q. In fact if you didn't extrude it,
6 you'd really have a difficult time rolling
7 up a hundred foot of an elongated material,
8 wouldn't you?

9 A. I would imagine there might be other
10 methods to doing it.

11 Q. But the simplest method is the
12 extrusion in a take-up roll, isn't it?

13 A. I don't know if it's the simplest
14 method or not.

15 Q. Well, do you know of a simpler
16 method?

17 A. I would imagine there's a whole realm
18 of possibilities of different ways to skin
19 the cat, so for me to tell you what the most
20 effective, cheapest, quickest way, and to
21 stand here and tell you that would be
22 inaccurate.

23 Q. I thought that was part of what you
24 studied in school, wasn't it, process
25 engineering?

1 A. I did.

2 Q. Okay. But you can't --

3 MR. COHN: Now it's a little late
4 in the day for you to try to debate him on
5 something.

6 MR. WEBER: I'm not wanting to
7 debate.

8 MR. COHN: He answered your
9 question. You said Goecke, you can't answer
10 me? He answered it.

11 MR. WEBER: No, I didn't. Well,
12 thank you, do you want to form some more
13 questions for me?

14 MR. COHN: No, you're doing bad
15 enough on your own.

16 MR. WEBER: Okay, good, good. I
17 think we've done quite well today, as a
18 matter of fact I think we've done extremely
19 well.

20 MR. COHN: Wait until you read the
21 transcript.

22 MR. WEBER: Okay. I don't think
23 I'm even going to need a transcript after
24 today.

25 BY MR. WEBER:

1 Q. Do you know how many generations of
2 the DuraStripe product there have been?

3 A. No.

4 Q. Have you ever heard of the Supreme
5 five or the Supreme V generation?

6 A. Yes.

7 Q. And what is that?

8 A. A different version of the Ergomat
9 product.

10 Q. What does it have that's different
11 from the other generations?

12 A. I don't know.

13 (Defendant's Exhibit
14 No. 39 was marked
15 for identification.)

16 BY MR. WEBER:

17 Q. Do you recognize Exhibit 39?

18 A. Yes.

19 Q. What is it, apart from some of the
20 notes that are written on it or underlining
21 that's not in the original?

22 A. I'm sorry, what's the question
23 again?

24 Q. What is this document, apart from the
25 markings and the handwriting?

1 A. It's just a brochure for Ergomat's
2 tape products.

3 Q. Okay. Do you know what DuraStripe
4 Lean is?

5 A. Yes.

6 Q. And what is that?

7 A. It's a product that they sell in two
8 hundred foot rolls.

9 Q. If you look back on the third page
10 of this document there's a, from the way-back
11 machine, the Internet archives, it shows May
12 3rd of '09, new DuraStripe Supreme V, I think
13 that's five, Roman numeral five; is that
14 correct?

15 A. Yes.

16 Q. And it talks about a fifth generation
17 of the original DuraStripe. And down at the
18 last sentence of the second and last main
19 paragraph on that page it says, "It also has
20 the added benefit of having tapered edges to
21 eliminate potential tripping and impact
22 hazards," am I correct in that regard?

23 A. That's what it reads.

24 Q. Now, was the DuraStripe Supreme V
25 when the tapered edges were introduced to

1 DuraStripe?

2 A. No.

3 Q. Do you have any drawings of the
4 tooling that you've used for making
5 originally the DuraStripe stripe product and
6 today the product that you make?

7 A. No.

8 Q. You don't have any drawings of the
9 tooling?

10 A. I don't, no.

11 Q. Who does?

12 A. Phil Nye.

13 Q. Has he always had the drawings of the
14 tooling?

15 A. Yes.

16 MR. WEBER: Okay.

17 (Defendant's Exhibit
18 No. 40 was marked
19 for identification.)

20 BY MR. WEBER:

21 Q. Do you recognize Exhibit 40?

22 A. I recognize the first page. The
23 other pages, the first time I've seen it.

24 Q. Okay. What do you recognize the
25 first page to be?

1 A. A brochure on the DuraStripe
2 product.

3 MR. WEBER: 41.

4 (Defendant's Exhibit
5 No. 41 was marked
6 for identification.)

7 BY MR. WEBER:

8 Q. Do you recognize Exhibit 41?

9 A. Yes.

10 Q. And what is 41?

11 A. Installation tips for when you
12 install MightLine tape, when two lines
13 intersect at corners, the best way to miter
14 the corners, make it look better rather than
15 having one just go to the end of the other
16 one and butt up against it.

17 Q. So you do a mitered joint instead of
18 a butt joint?

19 A. Yes.

20 Q. You said MightyLine, this says
21 DuraStripe?

22 A. DuraStripe, I'm sorry, my error.

23 Q. Who came up with these installation
24 tips, was that you or Ergomat or?

25 A. Ergomat would have come up with this

1 one.

2 Q. I mean did you ever provide
3 installation instructions to Ergomat?

4 A. No.

5 MR. WEBER: Okay.

6 (Defendant's Exhibit
7 No. 42 was marked
8 for identification.)

9 BY MR. WEBER:

10 Q. Do you recognize Exhibit 42?

11 A. Yes.

12 Q. What is that?

13 A. A brochure for our MightLine tape
14 products.

15 Q. Does this show all of your floor tape
16 products?

17 A. No.

18 Q. It talks here about, on the second
19 page under the easy installation, just peel
20 and stick, and it talks about a double-coated
21 tape, is that the double-backed adhesive
22 we've been talking about?

23 A. Yes.

24 Q. And I do apologize, I know you've
25 said this before but what is the thickness

1 of the double-backed tape on your product?

2 A. The tape itself?

3 Q. Right -- or no, I'm sorry, but yeah,
4 that's a good point, the double-backed
5 adhesive, the adhesive you use, is it a
6 double-backed tape?

7 A. Yes.

8 Q. Okay. And that's applied to your
9 polymer layer?

10 A. Correct.

11 Q. And the thickness of the
12 double-backed tape that is applied to the
13 polymer layer is what?

14 A. Ten to eleven mil.

15 MR. WEBER: Okay.

16 (Defendant's Exhibit
17 No. 43 was marked
18 for identification.)

19 BY MR. WEBER:

20 Q. Do you recognize Exhibit 43?

21 A. Yes.

22 Q. And what is that?

23 A. A brochure for our MightyLine
24 products.

25 Q. Now, down on the front lower

1 left-hand corner you have a three year
2 limited warranty, right?

3 A. Yes.

4 Q. Now, when, when does the customer get
5 to see the warranty?

6 A. Oftentimes it's dealers will ask us
7 for it on behalf of a customer.

8 Q. So you actually have a written
9 warranty?

10 A. Yes, we do.

11 Q. You have down in the lower right-hand
12 corner "MightLine patent pending," is that,
13 was that referring to the '480 patent or the
14 application for the '480 patent or do you
15 know?

16 A. Yes.

17 Q. Yes you know or yes it is the '480?

18 A. Yes, it is.

19 Q. Okay, that was my fault.

20 MR. WEBER: Why don't we take
21 about a five minute break, I think I'm done
22 but I may have a couple more questions and
23 we'll be done with it.

24 - - -

25 (Short recess had.)

1 - - -

2 BY MR. WEBER:

3 Q. Okay. The advertising that your
4 company does of its product, do you keep a
5 portfolio or file of that advertising? You
6 know, when you've developed an ad, do you
7 keep a copy of that ad?

8 A. Is there a specific ad?

9 Q. No, no, I'm just wanting to know the
10 chronology of ads for example that you've
11 run on the MightyLine product or the
12 DuraStripe when you were, you know, if you
13 did advertisements for the DuraStripe, things
14 of that nature.

15 Because the ads that I see that
16 I've been able to get aren't dated, do you
17 keep a listing of when an advertisement was
18 developed and when it was run?

19 A. No.

20 Q. Do you at least keep samples of your
21 advertising?

22 A. Yes.

23 Q. Okay. And do you have that in a
24 physical file or an electronic file?

25 A. Electronic.

1 Q. And how long does that go back?

2 A. I believe 2008.

3 Q. Now, at a point in time Advanced
4 Plastics was making product for Ergomat and
5 Ergomat was selling it, correct?

6 A. That's correct.

7 Q. And there came a point in time when
8 that stopped, is that fair to say?

9 A. Yes.

10 Q. What brought that stoppage about?

11 A. A falling-out.

12 Q. What do you mean by a falling-out?

13 A. There was a breach of an agreement
14 between Advanced and Ergomat.

15 Q. And did Ergomat quit buying from
16 Advanced or did Advanced cut Ergomat off?

17 A. Advanced cut Ergomat off.

18 Q. And when was that?

19 A. Early 2006.

20 Q. Okay. And did the two ever hook back
21 up?

22 A. No.

23 Q. Advanced has not made product for
24 Ergomat since then?

25 A. That's correct.

1 Q. And you're familiar with the Jayco
2 product that we've advanced in this case, are
3 you not?

4 A. Yes.

5 Q. Have you researched that Jayco
6 product any since it was brought to your
7 attention in this case?

8 MR. COHN: Objection, don't answer
9 that, if he's done that it's clearly been for
10 Rule 26 purposes.

11 BY MR. WEBER:

12 Q. It's clearly been done for Rule 26
13 purposes? What purposes did you do it for,
14 don't tell me what you did, just tell me the
15 purpose?

16 A. We used the material that you
17 provided us.

18 Q. To run tests?

19 A. To ascertain, yes.

20 Q. Okay. Did you provide that material
21 to an expert witness?

22 A. Yes.

23 Q. And who was that?

24 A. (Unintelligible)

25 MR. COHN: Objection. Did you

1 already answer?

2 MR. WEBER: Tim Sara did you say?

3 MR. COHN: Objection, don't

4 answer.

5 THE WITNESS: No.

6 BY MR. WEBER:

7 Q. Okay. Who is Anthony Goecke?

8 A. That's my brother.

9 Q. And what is Pristine Products?

10 A. A distributor.

11 Q. Of what?

12 A. MightyLine tape.

13 Q. And how long has he been a

14 distributor of MightyLine tape?

15 A. I have to think about that. I would

16 put it around 2011, 2010 or 2011.

17 Q. Do you know what type of business

18 Pristine Products was in in 2005?

19 A. It's possible it goes back that far,

20 being a distributor of our products in 2005.

21 Q. That's six years different from

22 2011.

23 A. At one point in time he made

24 mouldings, wood mouldings for houses.

25 Q. Where does your brother live?

1 A. Liberty, Indiana.

2 Q. Do you converse regularly?

3 A. Yes.

4 Q. Older brother or younger brother?

5 A. Younger.

6 Q. Did you know that your brother
7 attended the Jayco booth at a trade show on
8 January 10th through the 13th of 2005?

9 A. No.

10 Q. He never shared that with you?

11 A. No.

12 Q. Does that surprise you, if that in
13 fact is the case, would that surprise you?

14 MR. COHN: Objection.

15 THE WITNESS: No.

16 BY MR. WEBER:

17 Q. Does your brother go to trade shows?

18 A. Yes.

19 Q. Trade shows of the type that would
20 handle floor marking tape?

21 A. Yes.

22 Q. What is that, what is the nature of a
23 trade show that would feature or include
24 floor marking tape?

25 A. Material handling shows, safety

1 shows.

2 Q. Okay. Now, when your brother would
3 go to these types of shows, did he pay his
4 own way or did you help fund it? And by you
5 I mean your company or you personally.

6 A. He would pay his own way.

7 Q. Who are Alec and Michael Goecke?

8 A. Alec is my son, Michael is another
9 brother of mine.

10 Q. Are they both involved in the
11 business?

12 A. Alec works for ShieldMark, Mike has
13 his own company.

14 Q. Does he sell ShieldMark product?

15 A. Yes.

16 Q. Did the two of them visit the Jayco
17 booth at a show in Atlanta in 2012?

18 A. I believe they did.

19 Q. And they reported that back to you?

20 A. No.

21 Q. How do you come to the belief that
22 they did?

23 A. After, it was brought up in the
24 conference with you and your party, they
25 mentioned that they had stopped by the

1 booth.

2 MR. WEBER: Okay. Why don't you
3 mark this as the next exhibit.

4 (Defendant's Exhibit
5 No. 44 was marked
6 for identification.)

7 BY MR. WEBER:

8 Q. Do you recognize Exhibit 44?

9 A. Yes.

10 Q. And what is Exhibit 44?

11 A. It's our response to your
12 interrogatories.

13 Q. Now, when was the first time you
14 heard of Jayco?

15 A. At your conference in May of 2012.

16 Q. Did you review Exhibit 44 before it
17 was sent to us?

18 A. Yes.

19 Q. Did you ever sign the back sheet of
20 this document?

21 A. Yes.

22 Q. You did.

23 MR. WEBER: Did you provide us
24 with a signed one, I don't have a signed
25 sheet, do you know if it ever was?

1 MR. HARDERS: I'm pretty sure that
2 we do have a copy of that and I think we
3 didn't get yours either.

4 MR. WEBER: No, and that's the
5 reason he asked him and he just said yeah,
6 those are my answers.

7 MR. COHN: And you should if you
8 don't already have a signed one.

9 BY MR. WEBER:

10 Q. Okay. You have signed this, or do
11 you remember?

12 A. I don't remember.

13 MR. WEBER: Okay. And you're
14 going to look then, right, Scott?

15 MR. HARDERS: Yes.

16 BY MR. WEBER:

17 Q. Okay. One of the, well, let me just
18 ask you, one of topics you were to be
19 prepared to testify on was damages. How,
20 what is the nature and extent of the damages
21 that ShieldMark has suffered because of the
22 alleged wrongdoing of InSite?

23 A. I would have to know the sales that
24 we lost in our product as a result of the
25 competing infringing product taking its

1 place to give you an accurate assessment on
2 that.

3 Q. All right. Well, I think you do have
4 that, at least your --

5 A. I don't have that.

6 MR. COHN: We have it for
7 counsel's eyes only.

8 MR. WEBER: Okay, you've got it,
9 but how would --

10 MR. COHN: He doesn't have it.

11 BY MR. WEBER:

12 Q. Are you saying -- well, strike that.
13 Who are your competitors in
14 this industry?

15 A. The competitors include Brady,
16 Creative, InSite, 3M, 3 Com or In Com, and
17 anybody who paints their floors with paint,
18 amongst I'm sure others, Windmill Tapes.

19 Q. I didn't get the second one you said,
20 Brady something, then 3M, In Com, people who
21 paint floors, Windmill Tapes?

22 MR. COHN: You skipped InSite and
23 Creative.

24 MR. WEBER: Okay.

25 MR. COHN: I think we can have it

1 read back.

2 MR. WEBER: No, no, that's fine.

3 BY MR. WEBER:

4 Q. Does Brady infringe your patent?

5 A. No.

6 Q. Does 3M?

7 A. No.

8 Q. Does N Com? I said N Com but I --

9 how do you spell it?

10 A. I don't know.

11 Q. Does it sound like I-N-C-O-M-E or

12 I-N-C-O-M?

13 A. It sounds like I-N-C-O-M.

14 Q. Okay. Painting floors certainly

15 doesn't infringe your patent, does it?

16 A. No.

17 Q. Does Windmill Tapes, do they infringe

18 your patent?

19 A. No.

20 Q. Any other competitors you can think

21 of?

22 A. Not at the moment.

23 Q. So are you saying that every sale

24 that InSite made was a sale that you lost, is

25 that your assessment?

1 A. A possible sale that we lost.

2 Q. Have you made an assessment or tried
3 to evaluate what a reasonable royalty would
4 be on your patent?

5 A. Yes.

6 Q. And what's the figure you've come up
7 with on that?

8 A. Well, I think we're into the
9 confidential nature of this.

10 Q. How would you determine what a
11 reasonable royalty would be on your product?

12 A. I would take the sales of what they
13 should be and then take my gross margin.

14 Q. And then what?

15 A. Multiply times the gross margin.

16 Q. Well, that would be your actual
17 damages, wouldn't it?

18 A. And what were you asking for then?

19 Q. I was asking a reasonable royalty
20 rate, how would you determine a reasonable
21 royalty rate for your product if you were
22 trying to assess damages?

23 MR. COHN: He obviously didn't
24 understand the difference when you asked the
25 question.

1 BY MR. WEBER:

2 Q. Okay. In the first instance you're
3 saying a sale that InSite made is possibly a
4 sale you lost, right?

5 A. That's correct.

6 Q. And therefore you should get your
7 gross margin on those sales, correct?

8 A. Correct.

9 Q. All right. Now, if the law were to
10 say you're not entitled to these actual
11 damages but you're entitled to a reasonable
12 royalty, what would a reasonable royalty be
13 for this product?

14 What would a royalty rate be
15 for this product and how, how have you come
16 to determine that to be a reasonable
17 royalty?

18 A. Royalty rates vary anywhere in the
19 range from five to twenty percent.

20 Q. Okay. What product, are you familiar
21 with any licenses for twenty percent?

22 A. No.

23 Q. Okay. But anyhow, for your product
24 -- this isn't a cure for cancer, right, I
25 mean we'll agree to that, this is a tape, so

1 what would be a reasonable royalty rate for
2 this adhesive tape?

3 MR. COHN: It's an important
4 enough product for your client.

5 MR. WEBER: I wouldn't use terms
6 like that if I were you.

7 MR. COHN: Are you going to sue
8 me?

9 MR. WEBER: No, I'm not going to
10 sue you, but we're sure going to look for
11 getting our attorney fees in this case.

12 MR. COHN: That was such a
13 terrible thing, that I made a joke.

14 MR. WEBER: If this goes much
15 further.

16 BY MR. WEBER:

17 Q. But I'd like to know what would be a
18 reasonable royalty?

19 A. Well, I think you were privy to the
20 document for the other agreement we had, were
21 you not?

22 Q. Well, I'm privy to that.

23 A. It would be that plus two.

24 Q. And why?

25 A. I've gone through considerable

1 expense going through this process and
2 enforcing the rights of my patent.

3 Q. Uh-huh. Well, okay, that would be a
4 recovery of attorney fees, you know, if you
5 were, you know, or a trebling of damages if
6 you thought there was willful infringement
7 and could prove it.

8 MR. COHN: Are you giving a
9 lecture or are you trying to ask questions?

10 MR. WEBER: No, I'm trying to get
11 him back on track here, what reasonable
12 royalty would be.

13 MR. COHN: He's answered your
14 question. Maybe it's not an answer that you
15 think is correct but he's given it.

16 MR. WEBER: Well, no, I'm not
17 judging whether it's correct or not, I am
18 trying to --

19 MR. COHN: Well, you're arguing
20 with him about it.

21 MR. WEBER: I'm not arguing, I'm
22 trying to -- I'll just ask one time very
23 succinctly and then I'll leave your answer
24 for the record and we'll be done with it.

25 BY MR. WEBER:

1 Q. What would a reasonable royalty rate
2 on your product be or product made under your
3 patent would be and what is the basis for
4 your determination of that rate?

5 A. The determination of the rate would
6 be based on fact that, well, the reasonable
7 rate I just gave you.

8 Q. X plus two?

9 A. That's right.

10 Q. And now the reasoning behind this or
11 the justification or method for determining
12 it?

13 A. Because of the inordinate amount of
14 time and expense I've had to incur to reach
15 the point in time to sustain an agreement.

16 Q. To reach an agreement with somebody
17 who thinks your patent is invalid and not
18 infringed; is that correct?

19 A. That's the other side of the
20 opinion.

21 Q. Well, no, that's, that is what goes
22 into it.

23 A. I'm not going to tell you that's
24 correct.

25 Q. And I don't expect you to but that's

1 what goes into an arm's length negotiation
2 and that's what you're looking for in a
3 reasonable royalty, you have someone that
4 says I don't think your patent is valid and I
5 don't think it's infringed and you're
6 saying...

7 You know, I think you need to
8 look at that part of the equation just as we
9 need to look at our part of the equation.
10 And I don't mean to be lecturing, I do
11 apologize because I did say I would ask for
12 your answer and let it go, but are you done
13 with your answer?

14 A. Yes.

15 Q. And do you reaffirm, to the extent
16 you affirmed it before, the answers and
17 responses in Exhibit 44?

18 A. Yes.

19 Q. When you were selling product during
20 your developmental period while you were
21 still working at Akro-Mils, what was the
22 name of the product, what was the trademark
23 or product name that you gave these
24 products?

25 MR. COHN: Objection.

1 THE WITNESS: Floor tape.

2 BY MR. WEBER:

3 Q. Floor tape?

4 A. Uh-huh.

5 Q. You never registered that, did you?

6 A. No.

7 Q. Did you use your company name in
8 association with it, did you use --

9 A. Yes.

10 Q. Okay. Let me ask you this, is John
11 Davis, he's a CPA?

12 A. Yes.

13 Q. Do you know where he worked before he
14 worked with Advanced Plastics?

15 A. No. He's a part-owner of Advanced
16 Plastics, he doesn't work there.

17 Q. Oh, he's just -- I apologize, I don't
18 mean just, he's an owner but he doesn't work
19 there?

20 A. Correct.

21 MR. WEBER: Okay. Well, I have no
22 further questions of you at this time and I
23 appreciate your patience.

24 THE WITNESS: Thank you.

25 MR. COHN: No questions. We'll

1 read it.

2 - - -

3 (Deposition concluded at 6:00 o'clock p.m.)

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I, THOMAS R. GOECKE, do verify
that I have read this transcript consisting
of two hundred and forty-six (246) pages and
that the questions and answers herein are
true and correct with corrections as noted on
the errata sheet.

THOMAS R. GOECKE

Sworn to before me _____,
a Notary Public in and for the State of
_____, this ____ day of _____, 2013.

Notary Public in and for the
State of _____

My commission expires -----

THOMAS R. GOECKE

Page/Line

Correction

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C E R T I F I C A T E

STATE OF OHIO,)
) SS:
SUMMIT COUNTY.)

I, Michael G. Cotterman, a Notary Public within and for the State of Ohio, duly commissioned and qualified, do hereby certify that the within named witness, THOMAS R. GOECKE, was by me first duly sworn to testify the truth, the whole truth and nothing but the truth in the cause aforesaid; that the testimony then given by the witness was by me reduced to Stenotypy in the presence of said witness, afterwards transcribed upon a computer; and that the foregoing is a true and correct transcription of the testimony so given by the witness as aforesaid.

I do further certify that this deposition was taken at the time and place in the foregoing caption specified, and was completed without adjournment.

I do further certify that I am not a relative, employee of or attorney for any of the parties in the above-captioned action; I am not a relative or employee of an attorney of any of the parties in the above-captioned action; I am not financially interested in the action; and I am not, nor is the court reporting firm with which I am affiliated, under a contract as defined in Civil Rule 28(D).

IN WITNESS HEREOF, I have hereunto set my hand and affixed my seal of office at Akron, Ohio on this 2nd day of May, 2013.

Michael G. Cotterman, a Notary
Public in and for the State of Ohio.

My Commission expires October 25, 2017.